affirmed and assigned to Swayne J.

Field J.

4.

SUPREME COURT OF THE UNITED STATES.

No. ~~852.~~ 259 84

JOHN DOE, EX DEM. JOHN A. POOR AND MARGARET R. POOR, HIS WIFE, PLAINTIFFS IN ERROR,

vs.

PATRICK CONSIDINE, EPHRAIM MORGAN, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED DECEMBER 29, 1865.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

No. 352.

JOHN DOE, EX DEM. JOHN A. POOR AND MARGARET R. POOR, HIS WIFE, PLAINTIFFS IN ERROR,

vs.

PATRICK CONSIDINE, EPHRAIM MORGAN, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

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1 At a circuit court of the United States within and for the seventh circuit and southern district of Ohio, begun and held at the court-house in the city of Cincinnati, in said district, on the first Tuesday, being the third day of the month of October, in the year of our Lord eighteen hundred and sixty-five, and in the 90th year of the independence of the United States of America.

Present: the honorable Noah H. Swayne, and the honorable Humphrey H. Leavitt, the judges of said court, among other the following proceedings were had, to wit:

JOHN DOE, *ex dem.* JOHN A. Poor and Margaret R. Poor
vs.
RICHARD ROE.
} In ejectment.

Be it remembered that heretofore, to wit, on the 15th day of December, A. D. 1863, came the said plaintiff by his attorneys and filed in the clerk's office of the court aforesaid his declaration and notice in ejectment in the words and figures following, to wit:

UNITED STATES OF AMERICA, *Southern district of Ohio, ss:*

Circuit court of the United States, vacation before February term A. D. 1864.

John Doe, a citizen of and resident in the State of Maine, complains of Richard Roe, a citizen of and resident in the State
2 of Ohio, for that heretofore, to wit, on the 1st day of July, A. D. 1863, at Cincinnati, to wit, at the district aforesaid, John A. Poor and Margaret R. Poor, wife of the said John R. Poor, citizens of and residents in the State of Maine, had demurred to the said John Doe, the following lands and tenements lying and situate in the county of Hamilton, and State of Ohio, and in the southern district of Ohio, to wit, all that portion of section thirty-six, in township four, F range, one of the Miami purchase, so-called, which was conveyed to William Barr, senior, by John Cross and wife, said property being bounded and described as follows: Beginning at the north, east corner of the section, thence in the section line, north 39′ east, forty-nine chains and forty links to Kautz' corner; thence south 89½° west, thirty-two chains and sixty-six links to a stake; thence, parallel to the first course along the line of William Terry, to a stake in the east and west lines of the section, forty-nine chains and forty links; thence, in the section line, thirty-two chains and sixty-six links to the place of beginning; and also twenty messuages, twenty cabins, twenty barns, twenty stables, twenty orchards, twenty out-houses, twenty yards, twenty gardens, five hundred acres of arable land, five hundred acres of meadow land, five hundred acres of pasture land, five hundred acres of wood land, five hundred acres of land
3 covered with water, and five hundred acres of other land, with the appurtenances, situate in the county of Hamilton, in the State of Ohio, and in the southern district of Ohio aforesaid; to have and to hold the same to the said John Doe, from the first day of July, A. D. 1863, for and during the term of ten years, thence next

ensuing. By virtue of which demises the said John Doe entered into the said tenements with the appurtenances and was possessed thereof, for the term aforesaid. And the said John Doe being so thereof possessed, the said Richard afterwards, to wit, on the fifth day of July, A. D. 1863, with force and arms entered into the said tenements, with the appurtenances, and ejected the said John Doe therefrom, and other wrongs to the said John then and there did, to his damage one hundred dollars, and therefore he sues.

By THOS. EWING and JOHN W. ANDREWS,
Att'y for Pl'ffs.

To Patrick Considine, John B. Purcell, E. Henry Carter, John Young, Stephen S. Boyle, Ephraim Morgan, James Morgan, and Rebecca A. Hubbard:

I am informed that you are in possession of or claim title to the premises in this declaration mentioned or some part thereof, and I being sued in this action as a casual ejector and having no title
4 to the said premises, do advise you to appear at the February term of the circuit court of the United States, in and for the southern district of Ohio, in the year 1864, and make yourselves defendants in my stead, otherwise judgment will be entered against me by default, and you will be turned out of possession.

RICHARD ROE.

Dated Nov. 16, 1863.

We, Sam'l B. Keys and J. L. Hickman, acknowledge ourselves security for all costs for which the plaintiff may be liable in this case.

SAM'L B. KEYS. [SEAL.]
J. L. HICKMAN. [SEAL.]

On which declaration is the following endorsement, to wit:

UNITED STATES OF AMERICA, *Southern district of Ohio, ss:*

I, Frank D. Bartlett, being duly sworn, say upon oath, that on the 24th day of November, 1863, I did personally serve Patrick Considine, John B. Purcell, John Young, and Rebecca A. Hubbard, four of the tenants in possession of the premises described in the declaration on file in this case, each respectively with a true copy of said declaration, and of the notice attached thereto, and on the same day, I served E. Henry Carter, Stephen S. Boyle, and Ephraim
5 Morgan, three others of said tenants, each respectively with a true copy of said declaration and notice by leaving the same at the residence of each of said parties on the premises decribed in said declaration, and did on the same day serve James Morgan, the other tenant in possession, with a true copy of said declaration and notice, by leaving the same at his residence in the city of Cincinnati, to wit, at the district aforesaid.

FRANK D. BARTLETT.

Sworn to and subscribed before me this 28th day of November, A. D. 1863.

[SEAL.] JOS. H. GEIGER,
Cl'k Circuit Court U. S., South Dis't, Ohio.

[3 cent rev. stamp.]

And afterwards, to wit, on the 6th day of February, A. D. 1864, it being the February term of said court for the year aforesaid, came the said Patrick Considine, Ephraim Morgan, John Young, and Caroline Young, his wife, E. Henry Carter, Joseph B. Hubbard, and Rebecca A. Hubbard, his wife, by George E. Pugh, their attorney, and on motion to the court, the said parties, who are in possession of and claim title to several parcels of the lands and tenements described in the declaration, it is ordered that they, as to the parcels by them respectively claimed, be made defendants in place of
6 Richard Roe; and that said defendants plead to the original declaration as if therein named as defendants, within twenty days from this, and it is further ordered that each of said defendants in his or her plea respectively describe the particular parcel of the lands and tenements aforesaid, by him or her claimed, and admit that he or she was in possession of the same at the time of the service of the declaration, and also confess the lease, entry and ouster, by the plaintiff alleged.

And afterwards, to wit, on the day and year last aforesaid, came John B. Purcell and Stephen S. Boyle, by Lincoln, Smith and Warnock, their attorneys, and on motion to the court, the said parties who are in possession of and claim title to several parcels of the lands and tenements described in the said declaration, it is ordered that they, as to the parcels by them respectively claimed, be made defendants in place of Richard Roe; and that the said defendants plead to the original declaration as if therein named as defendants, within twenty days from this date. And it is further ordered that each of said defendants in his plea respectively describe the particular parcel of the lands and tenements by him or her claimed, and admit that he was in possession of the same at the service of the declara-
7 tion, and also confess the lease, entry, and ouster by the plaintiff alleged.

And afterwards, to wit, on the 8th day of February, A. D. 1864, came E. Henry Carter, by George E. Pugh, his attorney, and filed in the clerk's office of the court aforesaid his plea in the premises in the words and figures following, to wit:

Plea of E. H. Carter.

JOHN DOE, *ex dem.* John A. Poor, and Margaret R. Poor, his wife, plaintiffs,
against
E. HENRY CARTER, are pleaded with Patrick Considine, Ephraim Morgan, John Young and Caroline Young, his wife, Joseph B. Hubbard and Rebecca A. Hubbard, his wife, John B. Purcell, and Stephen S. Boyle, defendant.

E. Henry Carter, the defendant above named, and a citizen of the State of Ohio, admits that he was at the time of the service of the plaintiff's declaration, and still is, in possession of the following described lands and tenements, with the appurtenances, situate in the

northeast quarter of section thirty-six, fourth township and first fractional range of the Miami purchase, in Hamilton county, Ohio, being parcel of the lands and tenements mentioned in the declaration, to wit: Commencing at a point where the east line of Adam Moore's land, or what was formerly such, intersects the road, on the north line of said road, which point is two links north of a stone; thence
north five degrees west, along a board fence, seven chains,
8 seventy-five links to a post and rail fence agreed upon as the
line between the lands of Ephraim Morgan and those of Patrick Considine; thence north seventy-five degrees ten minutes east, along said post and rail fence, four chains seventy-nine links, to a stake; thence south five degrees east, parallel to the first line, nine chains twenty-four links, to the north line of the road; thence north eighty-seven degrees fifty minutes west, along the north line of said road, four chains seventy-three links and one-half link, to the place of commencement, and containing four acres.

And furthermore, confessing the lease, entry and ouster alleged in the declaration, and insisting upon the title only, the said defendant E. Henry Carter, for plea says that he is not guilty of the supposed trespass and ejectment in manner and form as John Doe hath complained; and of this he puts himself upon the country, and the plaintiff doth the like.

GEO. E. PUGH, *Att'y for Defendant.*

And afterwards, to wit, on the day and year last aforesaid, came John Young and Caroline Young, his wife, by their attorney, and filed in the clerk's office of the court aforesaid his plea in the premises in the words and figures following, to wit:

9 *Plea of John Young and Caroline Young.*

JOHN DOE, *ex dem.* John A. Poor and Margaret R. Poor, his wife, plaintiff,
against
JOHN YOUNG and CAROLINE YOUNG, his wife, impleaded with Patrick Considine, Ephraim Morgan, E. Henry Carter, Joseph B. Hubbard and Rebecca A. Hubbard, his wife, John B. Purcell, and Stephen S. Boyle, defendants.

John Young and Caroline Young, his wife, the defendants abovenamed, and citizens of the State of Ohio, admit that they were at the time of the service of the plaintiff's declaration, and still are, in possession of the following described lands and tenements, with the appurtenances, situate in the northeast quarter of section thirty-six, fourth township and second fractional range of the Miami purchase, in Hamilton county, Ohio, being part of the lands and tenements mentioned in the declaration, to wit, beginning at a stake on the public road at the northwest corner of William Wood's land, or what was formerly such, where the same adjoins the land of William Terry,

or what was formerly such, and thence north ten minutes west, along said Terry's line thirty-three chains forty-one links, to a stake on the north line of the section; thence east along the section line, two chains sixty-five links, to a stake at the corner of Patrick Considine's land; thence south seventeen degrees east, along said Considine's land, twenty-six chains sixty-five links, to a stake in the old road at the southwest corner of said Considine's land; thence south ten minutes east, along the line of Ephraim Morgan's land eight chains, sixty-nine links, to William Wood's line; thence north eighty-five degrees thirty-five minutes west, along said Wood's line, ten chains thirty-one links, to the place of beginning, and containing twenty-five acres and four-hundredths of an acre, strict measure.

And furthermore confessing the lease, entry, and ouster alleged in the declaration, and insisting upon the title only, the said defendants, John Young and Caroline Young, his wife, for plea say that they are not guilty of the supposed trespass and ejectment in manner and form as John Doe hath complained, and of this they put themselves upon the country, and the plaintiff doth the like.

G. E. PUGH, *Attorney for Def'ts.*

And afterwards, to wit, on the day and year last aforesaid, came Joseph B. Hubbard and Rebecca A. Hubbard, his wife, by their attorney, and filed in the clerk's office of the court aforesaid their plea in the premises in the words and figures following, to wit:

Plea of Jos. B. Hubbard and R. A. Hubbard.

JOHN DOE, *ex dem.* John A. Poor and Margaret R. Poor, his wife, plaintiff,
11 *against*
JOSEPH B. HUBBARD and REBECCA A. Hubbard, his wife, impleaded with Patrick Considine, Ephraim Morgan, John Young and Caroline Young, his wife, E. Henry Carter, John B. Purcell, and Stephen S. Boyle, defendants.

Joseph B. Hubbard and Rebecca A. Hubbard, his wife, the defendants above-named, and citizens of the State of Ohio, admit that they were at the time of the service of the plaintiff's declaration, and still are, in possession of the following described lands and tenements, with the appurtenances, situate in the northeast quarter of section thirty-six, fourth township and first fractional range of the Miami purchase, in Hamilton county, Ohio, being parcel of the lands and tenements mentioned in the declaration, to wit: commencing at a point in the south line of Ephraim Morgan's tract of land, or what was formerly such, five hundred and ninety-five feet and ninety-seven hundredths of a foot west from the southeast corner of said tract, (the corner being marked by a stone in the section line,) and thence northwardly one thousand and sixty-one feet and ninety-hundredths of a foot to the centre of the Cincinnati and Warsaw turnpike road,

four hundred and seventy-one feet and seventy-five hundredths of a foot west of the northeast corner of said Morgan's tract;
12 thence westwardly along the centre of said turnpike road four hundred and twelve feet and five hundredths of a foot, more or less, to a point in the centre of said road three hundred and seventeen feet and two-hundredths of a foot east of the northwest corner of the same tract; thence southwardly one thousand and sixty-four feet and twenty-two hundredths of a foot, to a point in the south line of the same tract three hundred and forty feet and fifteen hundredths of a foot east of the southwest corner thereof; thence south eighty-nine degrees forty-two minutes east, with the south line of said Morgan's tract four hundred and eleven feet and ninety-eight hundredths of a foot, to the place of beginning, and containing ten acres.

And furthermore confessing the lease, entry and ouster alleged in the declaration, and insisting upon the title only, the said defendants, Joseph B. Hubbard and Rebecca A. Hubbard, his wife, for plea says that they are not guilty of the supposed trespass and ejectment in manner and form as John Doe hath complained, and of this they put themselves upon the country, and the plaintiff doth the like.

G. E. PUGH, *Attorney for Def'ts.*

13 And afterwards, to wit, on the day and year last aforesaid, came Patrick Considine, one of the defendants, George E. Pugh, his attorney, and filed in the clerk's office of the court aforesaid his plea in the premises, in the words and figures following, to wit:

Plea of Considine.

JOHN DOE *ex dem.*, JOHN A. POOR and MARGARET R. POOR, his wife, plaintiffs,
against
PATRICK CONSIDINE, impleaded with Ephraim Morgan, John Young and Caroline Young, his wife, E. Henry Carter, Joseph B. Hubbard and Rebecca A. Hubbard, his wife, John B. Purcell, and Stephen S. Boyle, defendants.

Patrick Considine, the defendant above named, and a citizen of the State of Ohio, admits that he was at the time of the service of the plaintiffs' declaration, and still is, in possession of the following described lands and tenements, with the appurtenances, situate in the northeast quarter of section thirty-six, fourth township and first fractional range of the Miami purchase, in Hamilton county, Ohio, being parcel of the lands and tenements mentioned in the declaration, to wit, beginning at the northeast corner of said section; thence south thirty minutes, east along the east line of the section, thirty-five chains seventy-three links, to a stake in a public road; thence nearly along the middle of said road, the three following courses, to wit, north forty-four degrees thirty minutes west, ten chains
14 thirty-three links, to a stake, north sixty-one degrees thirty minutes west, ten chains eight links, to a stake, and south

seventy-two degrees forty-five minutes west, six chains fifty links, to a stake; thence leaving the road and running north seventeen degrees west, twenty-six chains fifty-nine links, to a stake in the north line of the section; thence east along said section line, twenty-nine chains ninety links, to the place of beginning, and containing seventy-one acres, strict measure, but excepting therefrom five acres conveyed by this defendant to John B. Purcell, and for which said Purcell now separately defends.

And furthermore confessing the lease, entry, and ouster alleged in the declaration, and insisting upon the title only, the said defendant, Patrick Considine, for plea says that he is not guilty of the supposed trespass and ejectment in manner and form as John Doe hath complained, and of this he puts himself upon the country, and the plaintiffs doth the like.

G. E. PUGH, *Attorney for Def't.*

And afterwards, to wit, on the day and year last aforesaid, came Ephraim Morgan, another of the defendants, by his attorney,
15 and filed in the clerk's office of the court aforesaid his plea in the premises, in the words and figures following, to wit:

Plea of Morgan.

JOHN DOE, *ex dem.* John A. Poor and Margaret R. Poor, his wife, plaintiffs,
against
EPHRAIM MORGAN, impleaded with Patrick Considine, John Young and Caroline Young, his wife, E. Henry Carter, Joseph B. Hubbard and Rebecca A. Hubbard, his wife, John B. Purcell, and Stephen S. Boyle, defendant.

Ephraim Morgan, the defendant above named, and a citizen of the State of Ohio, admits that he was at the time of the service of the plaintiff's declaration, and still is, in possession of the following described lands and tenements, with the appurtenances, being parcel of the lands and tenements mentioned in the declaration, to wit, the northeast quarter of section thirty-six, fourth township and first fractional range of the Miami purchase in Hamilton county, Ohio, being the same lands and tenements conveyed to William Barr, senior, by deed from John Cross, dated the sixth day of September, in the year eighteen hundred and fourteen, except the parcels of said quarter claimed by his co-defendants, Patrick, Considine, John Young and Caroline Young, his wife, E. Henry Carter, Joseph B. Hubbard and Rebecca A. Hubbard, his wife, John B. Purcell, and Stephen S. Boyle, and particularly described in the introductory part of their several pleas.

16 And furthermore confessing the lease, entry, and ouster alleged in the declaration, and insisting upon the title only, the said defendant, Ephraim Morgan, for plea says that he is not guilty

of the supposed trespass and ejectment in manner and form as John Doe hath complained, and of this he puts himself upon the country, and the plaintiff doth the like.

G. E. PUGH, *Attorney for Def't.*

And afterwards, to wit, on the 25th day of March, A. D. 1864, came Stephen S. Boyle, another of the defendants, by his attorneys, and filed in the clerk's office of the court aforesaid his plea in the premises, in the words and figures following, to wit:

Plea of Boyle.

JOHN DOE, *ex dem.* John A. Poor and Margaret R. Poor, his wife, pl'ff,
against
STEPHEN S. BOYLE, impleaded with Patrick Considine, Ephraim Morgan, John Young and Caroline Young, his wife, E. Henry Carter, Joseph B. Hubbard and Rebecca A. Hubbard, his wife, and John B. Purcell, def'ts.

Stephen S. Boyle, one of the defendants above named, admits that he was at the time of the service of the plaintiff's declaration, and still is, in possession of the following described lands and tenements, with the appurtenances, situate in the northeast quarter of
17 section thirty-six, fourth township, and first fractional range of the Miami purchase in Hamilton county, Ohio, and being part of the lands and tenements mentioned in the declaration, and described as follows, viz: bounded on the north by the Cincinnati and Warsaw turnpike, which separates it from the land of John Young, on the west by a county road separating it from the lands of William Terry, on the south by the lands of Wm. Overend and the estate of Routy, and on the east by a county road, separating it from the lands of Ephraim Morgan, said lot containing about twenty acres.

And furthermore confessing the lease, entry, and ouster in the declaration mentioned, for plea says that he is not guilty of the trespass and ejectment in the said declaration alleged against him in manner and form as alleged, and of this he puts himself upon the country; and the plaintiffs doth the like.

By LINCOLN, SMITH & WARNOCK,
his Attorneys.

And afterwards, to wit, on the day and year last aforesaid, came John B. Purcell, another of the defendants, by his attorneys, and filed in the clerk's office aforesaid his plea in the premises, in the words and figures following, to wit:

Plea of Purcell.

JOHN DOE, *ex dem.* John A. Poor and Margaret A. Poor, his wife, pl'ff,
against
18 JOHN B. PURCELL, impleaded with Patrick Considine, Ephraim Morgan, John Young and Catharine Young, his wife, E. Henry Carter, Joseph B. Hubbard and Rebecca Hubbard, his wife, and Stephen S. Boyle, def'ts.

John B. Purcell, one of the defendants above named, comes and confesses the lease, entry, and ouster in the said declaration named, and admits himself to be in possession of the two several lots hereinafter described, parcel of the premises in the said declaration mentioned, and situate in the county of Hamilton, in the State of Ohio, in section No. 36, in the fourth township and first fractional range of the Miami purchase, and the first of said lots being out of the southeast corner of a tract of land heretofore conveyed to one Patrick Considine by one Ephraim Morgan, as per deed recorded in Book No. 73, page 415, Records of Hamilton county, and bounded on the east by a line twenty-two feet west of the east line of the section, on the south by a thirty-three feet road, laid out along E. Morgan's north line, and on the west and north by lands of said Considine, containing five acres; also another lot, being parcel of the premises in the declaration mentioned, and bounded as follows, viz: situate in the said county of Hamilton in section 36, in the fourth township and first fractional range, on the north side of the Cincinnati and
19 Warsaw turnpike; beginning at an old stake set for the northeast corner of a tract of land heretofore conveyed by one E. Morgan to one Wm. A. Rombe, by deed dated August 4th, 1857, and recorded in Book 127, page 171, of Hamilton County Records; thence from said stake S. $4\frac{3}{4}°$ E., with said line 401 feet, to a stake in the centre of Cincinnati and Warsaw turnpike; thence, with the centre of the same, S. 87° 02′ E., 189.92 feet, to a stake set July 11, 1857, for the northwest corner of a tract of land conveyed by E. Morgan to S. T. Morgan; thence S. 88° 27′ E., 246.87 feet, to a stake set out at the northeast corner of said tract; thence north 88.35 east, 553.45 feet, to the line of an old post fence agreed to by E. Morgan and P. Considine as the division line between their lands; thence, with said fence, north 44° 51′ west, 702.05 feet, north 60° 15′ west, 616.19 feet, south 74° 17′ west, 122.87 feet, to the place of beginning, containing in all 9.7389 acres.

And furthermore the said defendant, John B. Purcell, for plea says that he is not guilty of the trespass and ejectment in manner and form, as in the said declaration is alleged against him; and of this he puts himself upon the country. And the plaintiff doth the like.

By his att'ys,

LINCOLN, SMITH & WARNOCK.

20 And afterwards, to wit, on the 21st day of November, A.D. 1865, it being the October term of said court for the year last aforesaid, to which term this cause was continued, came the said plaintiffs by their counsel, and *and* made known to the court that one of the defendants, Stephen S. Boyle, after having filed his plea and consent rule, defending for a certain part by metes and bounds, of the premises as the declaration mentioned, departed this life testate as to the premises so defended for, and that by his last will and testament, duly recorded in said Hamilton county, all of his title and estate in and to said premises are devised to Boyle, widow of said testator, and to his following named infant children, to wit: Jesse Payton Boyle, Elizabeth Boyle, Stephen Boyle, Edward Boyle, Anna Boyle, Margaret Boyle, and Alfred Boyle. Thereupon it is ordered that Rev'd Edward Purcell, the testamentary guardian of said infant children, be, and he is hereby, admitted to appear and defend in behalf of said minor children, and as their guardian ad litem and next friend, touching their interests in this action, and said widow and children are hereby made parties defendants in place of their said deceased ancestor.

And thereupon came said widow Boyle and said minor children by their said next friend and guardian ad litem, and by
21 way of defence herein submit their right to be tried and determined upon the plea and consent rule filed as aforesaid by their said ancestor.

And afterwards, to wit, on the 24th day of November, A. D. 1865, came the parties, and also came a jury, to wit, Lysle Lodwick, Rob't Simms, John W. Jackson, John Nerry, William Jolly, Prior Kirke, R. D. Mayhew, William Hoon, Ebenezer Harrison, W. L. Morton, S. W. Ladely, and William Rooney, who being duly sworn the truth to speak upon the issue joined between the parties, upon their oath do say and find that the defendants severally are guilty of the trespass and ejectment in the declaration of the plaintiff mentioned, and of and in the several parcels of said lands and tenements, with the appurtenances, whereof in pleading they severally admit themselves to have been in possession. and touching which they severally defend, to the extent of one undivided thirtieth part thereof, and as to the residue thereof that the said defendants are not guilty, and they assess the damages of the plaintiffs by reason of the premises against each of said defendants at one cent. It is thereupon considered by the court that the plaintiffs recover of the defendants and each of them severally the residue of his term yet to come of and in the said undivided one-thirtieth part of said lands and tenements, with the appurtenances; also the said damages assessed as aforesaid, to-
22 gether with the costs by the lessors of the plaintiff herein expended, taxed at $———.

And whereas, upon the trial before the jury, the court having given to the jury certain instructions touching the law arising upon the facts of the case, and the plaintiff, by his counsel, having excepted to the opinion of the court on the instructions so given to the jury, and a bill of exceptions in that regard being signed and sealed by

the court, it is by the court ordered that said bill of exceptions be made a part of the record of that case.

Be it also remembered that, upon the rendition of the verdict and judgment aforesaid, the defendants severally moved the court for leave to file motions, and to proceed as may be lawful to obtain the benefit of the act for the relief of occupying claimants; and leave is here given to them to proceed accordingly; all questions touching the right of said defendants therein severally being reserved for the further consideration of the court.

23 And afterwards, to wit, on the twenty-second day of November, in the year of our Lord one thousand eight hundred and sixty-five, a bill of exceptions was filed in this cause, which said bill of exceptions is in the words and figures following, to wit:

Ejectment.

Circuit court of the United States for the 7th circuit and district of Ohio, October term, A. D. 1865.

JOHN DOE, on the devise of John A. Poor and wife,
vs.
PATRICK CONSIDINE and others.

Be it remembered that on the trial of this case to the jury the parties submitted in evidence an agreed statement of facts, which are hereto attached, marked H, together with the exhibits therein referred to, marked A, B, C, D; which statements and exhibits are made a part of the bill of exceptions. And the defendants offered and gave in evidence the several written instruments and documents also hereto attached, marked 1, 2, 3, 4, 5, 6, 7, and 8, also made a part of the bill of exceptions, and no other evidence being offered or given by either of the parties, and the arguments of counsel being heard, the court instructed the jury, 1. That at the death of the said Mary Jane Barr, the granddaughter of the testator and daughter of said John M. Barr, she was seized of a vested remainder. 2. That at the death of the said Mary Jane Barr, her said estate in said farm descended to the brothers and sisters of the said testator then alive, and the legal representatives of such of them as were then deceased. 3. That the trust estate to the sons-in-law was only an estate pr autre vie and terminated at the death of Maria Bigelow; but whether that trust estate continued or not after her death the result is the same,

24 for if the estate so vested in Mary Jane Barr were only an equitable estate, no recovery could be had against the parties in possession under her title, in favor of the trustees or their heirs; and in no event, except the death of John M. Barr without issue, did the will give to the sons-in-law any interest in the property in controversy, other than the temporary trust estate. To which instructions to the court and to each of them the plaintiff excepted at the time of said trial, and prayed the court to sign and seal this his

bill of exceptions, and the same is done accordingly, and the court order that this bill of exceptions be made a part of the record.

Signed and sealed as aforesaid this 21st day of November, A. D. 1865.

N. H. SWAYNE. [SEAL.]
H. H. LEAVITT. [SEAL.]

Agreed statement of facts, made part of bill of exceptions.

In U. S. circuit court, southern district of Ohio.

DOE *ex dem.* John A. Barr and wife,
vs.
PATRICK CONSIDINE and OTHERS. } In ejectment.

The facts in said case are as follows:

The land in controversey was conveyed by John Cross and wife, September 6th, A. D. 1814, to William Barr, senior, of Cincinnati, being $161\frac{14}{100}$ acres, lying in the county of Hamilton and State of Ohio, and being a part of section 36, in township 4, range 1, of the Miami purchase, so called, being the premises described by metes and bounds in the declaration, said deed of John Cross and wife to said William Barr, senior, being duly recorded in the book of records of said Hamilton county.

2d. Both the lessors of the plaintiff and the defendants claim title under said William Barr, senior, dec'd, said Wm. Barr, senior, on the 24th day of February, A. D. 1816, being seized in fee simple of said premises, executed his last will and testament, and died seized of said premises on the 15th day of May, A. D. 1815, and the said last will and testament of said William Barr, senior, was duly admitted to probate in the court of common pleas of said Hamilton county, at the July term thereof, A. D. 1816, a duly certified copy of which said will is herewith filed, marked A.

3. John M. Barr, the son of William Barr, senior, referred to in the said will, was married to Maria McCune, July 22d, A. D. 1811, and a daughter was born to them, named Mary Jane Barr, December 27, A. D. 1815, at Cincinnati, where they resided during their married life. The said John M. Barr died August 10th, A. D. 1820, and his said child, Mary Jane Barr, died November 27, A. D. 1821.

4. The widow of said John M. Barr (Marion Barr) was again married to John Bigelow, October 19, A. D. 1824; she had as was decided by the supreme court of the State of Ohio, in the case of John Bigelow and Maria his wife *vs.* William Barr and others, (4 Ohio reports, 358,) a life estate in said premises under the will of said William Barr, senior.

5. On the 26 of July, A. D. 1838, the said Mrs. Maria Bigelow conveyed said premises by deed, purporting to be a conveyance in fee to Ephraim Morgan and Lot Pugh, for the consideration of $2,000, and they afterwards went into possession of said premises. Mrs. Maria Bigelow died August 3, A. D. 1860; her said husband John Bigelow having died before that date.

6. On the 13 day of September, A. D. 1839, said Lot Pugh released his interest in said premises to said Ephraim Morgan, and defendants are purchasers by deed in fee simple under said Morgan.

7. On the 20 day of April, A. D. 1847, a bill in chancery was filed in the superior court of Cincinnati, by Ephraim Morgan
26 *against* John B. Enness and others, to quit his alleged title to said premises, a duly certified copy of the proceedings and decree in said case being herewith filed, marked B, and also at the same time, and in the same court, another bill in chancery was filed by one Adam Moore against the same defendants, and for the same purpose. A duly certified copy of the proceedings and decree in which case last mentioned is herewith filed, marked C.

8. On the 29 day of June, A. D. 1858, a petition to perpetuate testimony in reference to said premises was filed in the court of common pleas of said Hamilton county, by said Ephraim Morgan and others *vs.* John B. Enness and others, a duly certified copy of the proceedings and order in which case last mentioned is herewith filed, marked D.

9. William Barr, senior, left at his death four children, to wit, Mary Barr, who was then the wife of William Barr, Susan Enness, who was then the wife of John B. Enness, and Mary B. Keys, who was then the wife of James Keys. The said William Barr, John B. Enness, and James Keys, being the three sons-in-law mentioned in the said will of William Barr, senior, named as devisees in remainder, and as residuary devisees and executors therein, the fourth child being the said John M. Barr. The said devisees, Barr, Keys, and Enness, having died after the death of Mary Jane Barr, the said child of John M. Barr.

10. Said daughters and sons-in-law of said William Barr, senior, are all dead, and were all dead before the commencement of this suit. The heirs of said daughter Mary Barr and of her said husband, William Barr, and of each of them, are as follows, to wit: Their chil-
27 dren, Mary Barr, Margaret R. Poor, wife of John A. Poor, Susan Spencer, Ellen Findley, wife of Alexander Findley, David M. Barr, and also the three children of their deceased son, William V. Barr, to wit, Ellen P. Barr, James B. Barr, and Alexander T. Barr, the three last named being minors, under the age of majority. The heirs of the said Susan Enness, and of the said husband John B. Enness, and of each of them, are Rachael Ellison, wife of A. B. Ellison, and Ellen Shiras. The heirs of the said Mary B. Keys, and of her said husband James Keys, and of each of them, are as follows, to wit: The children and heirs of their daughter Mary B. Kees, and of her husband, Keys, both deceased before the commencement of this suit, as follows, to wit, James Keeys Wilson, William B. Wilson, Joseph H. Wilson, and Mary F. Wilson, who are adults, and Richard A. Wilson and Ella T. Wilson, the two last named being minors, under the age of majority, respectively.

11. The said heir of Susan Enness and John B. Enness have conveyed all their interest in said premises to the said Margaret R. Poor in fee simple, and the said heirs of said Mary B. Keys, and her husband James Keys, have in like manner conveyed all their interest in said premises to the said Margaret R. Poor in fee simple, and the said heirs of Mary Barr, and her husband William Barr, have in like man-

ner conveyed all their interest in said premises to the said Margaret R. Poor, in fee simple, excepting only the interests of the said Mary Barr, (child of William and Mary Barr,) and of the said Ellen P. Barr, James B. Barr and Alexander F. Barr, minor children of said
28 William M. Barr, deceased, which still remain in them respectively, not having been conveyed to said Margaret R. Poor.

12. William Barr, senior, had brothers and sisters as follows, at the time of his death: Samuel Barr, John Barr, Robert Barr, Andrew Barr, Jane, married to W. McWhanter, and Sarah, married to W. Grafton; of these, two died leaving no issue surviving them; the other four left descendants, who are their heirs. Of these, Samuel Barr had and left at his death five children as his heirs, of whom William Barr, the husband of Mary Barr, the daughter of William Barr, senior, was one entitled to one-fifth of his real estate. Lessors of plaintiffs are citizens of and residents in the State of Maine. Soon after the date of the deed from said Maria Bigelow to Ephraim Morgan, under whom the defendants claim, purporting to convey the fee simple, said Morgan acquired the title and interest of sundry parties in said farm, who were the descendants and heirs-at-law of the brothers and sisters of William Barr, senior, the testator aforesaid, which brothers and sisters had previously died intestate; which interest so acquired amount to 29.30 cts. of the entire interest held by the heirs and descendants if any interest descended to them; that John M. Barr, at the date of the testator's will, was a man of intemperate habits.

It is understood that nothing herein contained shall limit the construction and legal effects of any deed of conveyance, but the same shall be determined by the court. The plaintiffs have exhibited to the defendant's counsel certain deeds of conveyance, under which the plaintiffs claim to derive title, also certain transcripts of records which it is agreed be used for all purposes, so far as compe-
29 tent evidence without proof of execution and without objection for want of government stamps, if such were required. The defendants have exhibited to the plaintiff's counsel sundry leases, deeds, mortgages, and transcripts, which it is agreed are to be admitted in evidence without proof of execution, leaving open all questions as to the competency thereof as evidence.

It is also agreed that the will in question was written by David E. Wade, and that he was at the time a lawyer. The parties respectively shall be permitted to give additional evidence. It is agreed that the value of the land in controversy exceeds the sum of $2,000.

HENRY STANLEY,
T. D. LINCOLN, *Counsel for Def'ts.*
H. H. HUNTER,
T. EWING,
J. W. ANDREWS, *Att'ys for Plaintiff.*

EXHIBIT A, (referred to in agreed statement of facts.)

Copy of will of William Barr, senior, dec'd.

In the name of God, amen! I, William Barr, senior, of the town of Cincinnati, in the State of Ohio, being old and feeble of body, but of sound and disposing mind, memory, and judgment, praised be Almighty God for the same, do make and declare this my last will and testament, in manner and form following: that is to say, I give and devise unto my sons-in-law, William Barr, James Keys, and John B. Enness of Cincinnati aforesaid, and to their heirs, all and singular that certain farm, tract, or parcel of land situated, lying, and being in the county of Hamilton and State of Ohio, which I purchased of John Cross, containing 160 acres, to hold the same premises to them and their heirs in trust, (first) for the use of my son John M. Barr during his natural life. But, nevertheless, to permit and suffer
30 my son John M. Barr to hold, use, and occupy, possess, and enjoy the said farm, and to receive and take the rents and profits thereof during his natural life, and in case my said son John M. Barr should die, leaving a legitimate child or children, then also in trust for Maria Barr, wife of said John M. Barr, in case she survives him, during her natural life, for the purpose of maintaining herself and the said child or children, and educating the said children, but nevertheless to permit and suffer the said Maria Barr, wife of the said John M. Barr, to hold, use, occupy, possess, and enjoy the said farm, and to receive and take the rents and profits thereof during her natural life; and upon the decease of the said Maria Barr, wife of the said John M. Barr, in case she survive him, if not, then upon the decease of the said John M. Barr, I do further give and devise the remainder of my estate in said farm unto the legitimate child or children of the said John M. Barr, and their heirs forever. If my said son have but one child as aforesaid, then I give and devise the said farm to him or to her, or his or her heirs forever, but if he have two or more children, then I give and devise the said farm unto such children, and their heirs, to be equally divided between them; but should my son John M. Barr die without leaving any issue of his body, then and in that case I do give and devise the remainder of my estate in the said farm unto my said sons-in-law, William Barr, James Keys, and John B. Enness, and their heirs forever. And if the present wife of my said son John M. Barr should survive him, he the said John M. Barr dying
31 without leaving any legitimate issue, then I direct my said sons-in-law, their executors and administrators, to pay, or cause to be paid, unto her yearly, and every year during her widowhood, the sum of two hundred dollars, and if during her widowhood she should again be lawfully married, then I further direct my said sons-in-law, their heirs, executors, or administrators, to pay or cause to be paid unto her the sum of one thousand dollars, unless the personal estate of my said son, John M. Barr, at his death, shall exceed the sum of four hundred dollars; then whatever the personal estate shall exceed the last-mentioned sum shall be taken and deducted from the said sum of one thousand dollars, the said annuity and gift at marriage, or either, to be paid out of my personal estate. And I do hereby

further direct my executors hereinafter named to finish, or cause to be finished, in a plain manner, the house and kitchen at present erected on the farm aforesaid, for the use and occupation of the said John M. Barr, as soon after my decease as is practicable; the said expense to be defrayed out of such parts of my personal estate as are not especially bequeathed. Also, I do hereby impower and direct my executors, hereinafter named, to apply the proceeds of a debt due to me, when collected, by one Joseph McKinney, of the State of Pennsylvania, of two thousand and fifty-one dollars and fifty-five cents, and the interest due or to grow due thereon, as also the proceeds of a debt due to me, when collected, by one Frederick Ross, of the State of Pennsylvania, of nine thousand five hundred and thirty-seven dollars fifty-two cents, and the interest due or to grow due thereon,
32 together with the proceeds of the sale of my house and lot in the town of Shepperdsburgh, in the State of Pennsylvania, amounting to the sum of five hundred dollars, or so much thereof as be necessary, towards the payment in full of the one hundred shares which I have purchased in the Miami Exporting Company Bank of Cincinnati, Ohio. Also, I give and bequeath unto my beloved wife, Mary Barr, the entire income or dividend on the said one hundred shares in the Miami Exporting Company, as well after as before the payments thereon are completed, subject nevertheless and charged with an annuity to our beloved son, John M. Barr, of the sum of fifty dollars yearly during his natural life, the first sum of fifty dollars to be paid in advance, within three months after my death, and thence forward at the expiration of each year from the date of such payment until his decease after the decease of my beloved wife. I will and bequeath the dividend of the said one hundred shares to be equally divided between my said sons-in-law, their heirs and executors and administrators, subject nevertheless to the annuity aforesaid to my son, John M. Barr, in case he survive my said wife. Also, I do further give and bequeath to my beloved wife, Mary Barr, all my household furniture, to be held absolutely as her property. Also, I give and bequeath to my grandson, William Barr Keys, my gold watch; also, I do further give, devise, and bequeath the remainder of my estate, both real and personal, to my sons-in-law, William Barr, James Keys, and John B. Enness; also, I direct my executor to pay my just debts and all testamentary and other incidental ex-
33 penses. And I will and appoint the said William Barr, James Keys, and John B. Enness. and the survivor or survivors of their executors, of this my last will and testament, hereby revoking and making void all and every other will or wills at any time heretofore by me made; and I do declare this to be my last will and testament.

In witness whereof, I, the said William Barr, senior, have hereunto set my hand and seal this twenty-fourth day of February, in the year of our Lord eighteen hundred and sixteen.

WILLIAM BARR. [L. S.]

Signed, sealed, acknowledged, published, and declared by the said William Barr, senior, as his last will and testament, in the presence of us, the words "in case she survive him" being first interlined, also the word "devise."

D. WADE.
FRANCIS CARR.
DAVID M. KNIGHT.

THE STATE OF OHIO, *Hamilton county, ss:*

I, Jno. B. Warren, judge of the probate court in and for the said county, do hereby certify the foregoing to be a true copy of the will of William Barr, as recorded in record of wills, book No. 2, page 127, In testimony whereof, I hereto set my hand and affix the seal of the probate court at Cincinnati, this 8th day of April, A. D. 1852.

[SEAL.] JOHN B. WARREN, *Pro. Judge.*
By G. A. HILTON, *Dep'y Clerk.*

EXHIBIT B, (referred to in agreed statements of facts.)

Pleas at the city of Cincinnati, in the county of Hamilton and State of Ohio, before the Hon. George Hoadley, jr., judge of the superior court of Cincinnati, in and for the said county, at the term of October, anno Domini one thousand eight hundred and fifty-one.

EPHRAIM MORGAN
against
JOHN B. ENNESS, DANIEL M. BARR, WILLIAM V. Barr, Mary Barr, William J. Vanhorne and Margaret R. Vanhorne, his 34 wife, John Spencer and Susan Spencer, his wife, Alexander Findley and Ellen Findley, his wife, Richard E. Keys, William B. Wilson and Mary B. Wilson, his wife. } Chancery, J. 428.

Be it remembered that heretofore, to wit, on the 20th day of April, A. D. 1847, came the above-named complainants, by Mitchell & Pendleton, his solicitors, and filed in the office of the clerk of said court his certain bill of complaint, clothed in the words and figures following, to wit:

Bill of complaint.

To the Hon. Wm. Johnston, judge of the superior court of Cincinnati, in chancery sitting:

Your orator, Ephraim Morgan, of the county of Hamilton and State of Ohio, respectfully represents that on the 10th day of December, in the year one thousand eight hundred and thirty-nine, he was possessed of the following described real estate situated in the county aforesaid, to wit, all that certain farm or tract of land situated in the fourth township in the first practical range in the Miami purchase,

being the northeast quarter of section number thirty-six, bounded as follows: beginning at the northeast corner of said section, thence south thirty minutes, (30,) east on the section-line forty-nine (49) chains and forty (40) links, thence south eighty-nine and a half (89½) degrees, west thirty-two (32) chains and sixty-six (66) links, to a stake; thence parallel with the first course along the line of William Teny, to a stake in the section line forty-nine (49) chains and 46 links, thence parallel with the second course on the section-line thirty-two (32) chains and sixty-six (66) links, to the place of beginning; containing one hundred and sixty-one acres and four-tenths of an acres, (161 $\frac{4}{10}$ acres,) more or less, being the same property conveyed by John Cross to William Barr, senior, by a deed dated September the sixth,
35 in the year eighteen hundred and fourteen, (1814,) and recorded in book of deeds O, page 359, of Hamilton county records. Your orator further represents that on the 10 day of December aforesaid, he conveyed by deed of general warranty to Patrick Considine, of said county, seventy-one (71) acres of said land, bounded and described as set forth in said deed, which is recorded in book of deeds number 73, page 415, of the records of Hamilton county, Ohio. Your orator also represents that on the nineteenth (19) day of May, in the year eighteen hundred and forty-three, (1843,) he conveyed by a like deed to Adam Moore, of said county, twenty five and four-tenths ($25\frac{4}{10}$) other acres of said land, bounded and described as set forth in said deed, which is recorded in book of deeds number 87, page 491, of the records of said county, so that there yet remains to your orator, unsold and unconveyed, sixty five (65) acres, or thereabouts, of said land, being all of the northeast quarter of said section number thirty-six not conveyed to Patrick Considine or to Adam Moore, as aforesaid, of which your orator is now in possession and holds the legal title, as he believes.

Your petitioner would further represent that William Barr, senior, deceased, late of the county aforesaid, was, during his life-time seized and possessed in fee simple of the whole of said quarter section, and that some time in the month of May, in the year eighteen hundred and sixteen, (1816,) he departed this life, having first duly made his last will and testament, a copy of which, marked A, is hereto appended, and prayed to be considered a part of this bill, by which he devised said tract of land to his sons-in-law, William Barr, James Keys, and John B. Enness, the two first of whom are now dead, and the first of whom was a nephew of the testator, upon the following trusts,
36 to wit: first, for the use of the testator's son, John M. Barr, during his natural life; the said trustees to suffer said John M. Barr to hold, use, occupy, possess, and enjoy the said land, and to take the rents and profits of the same; and, secondly, in case said John Barr should die, leaving a legitimate child or children, then also in trust for Maria Barr, wife of said John M. Barr, in case she should survive him, during her natural life, for the purpose of maintaining herself and said child or children and educating said children; said trustees to permit said Maria Barr to hold, use, occupy, possess, and enjoy said land, and to take the rents and profits of the same during her

natural life; said will further provides that upon the decease of said Maria Barr, wife of John M. Barr, in case she should survive her husband, the remainder of said testator's estate in said land should go to the legitimate child or children of said John M. Barr, and their heirs forever, all which will more fully appear by reference to the copy of said will hereto attached.

Your petitioner further shows that John M. Barr, the testator's son, died in the month of August, the year eighteen hundred and twenty, intestate, leaving only one child, an infant daughter, legitimately born of said John M. Barr, his wife Maria Barr surviving, and that said infant daughter, in the month of November, in the year eighteen hundred and twenty-one, (1821,) also died intestate and without issue, her mother, Maria Barr, still surviving; your petitioner further shows that said Maria Barr consequently intermarried with one John Bigelow, but said Bigelow died many years since and previous to the execution and acknowledgment of the deed hereinafter mentioned as having been given by said Maria Bigelow (formerly Maria Barr) to your orator and Lot Pugh;

said Maria is still living, the widow of John Bigelow,
37 her second husband, as aforesaid Under these circumstances
your orator is advised and claims that upon a proper construction of the will of William Barr, senior, the trustees aforesaid were invested with the legal title of said land only during the continuance of the life interests of John M. Barr and his wife, Maria; that upon the birth of the infant daughter of John M. Barr the remainder of the estate in said land, together with all title and rights to the same, both at law and in equity, immediately passed to and vested in said infant daughter, and that upon her death in the month of November, eighteen hundred and twenty-one, (1821,) all her right, title, and interest in and to the land in question passed to the brothers and sisters of the testator, William Barr, senior, and their heirs forever, in accordance with the statute of descents at that time in force in the State of Ohio.

Your orator further represents that on the ninth day of July, in the year eighteen hundred and thirty-eight, (1838,) said Maria Bigelow, for a valid consideration, conveyed to your orator and Lot Pugh "all her estate, right, title, interest, claim, and demand, both in law and equity, of, in, and to the aforesaid tract of land," which is evidenced by a deed in due form of that date recorded in book of deeds number 67, page 629, of the records of the county aforesaid: and that, consequently, on the thirteenth day of September, in the year eighteen hundred and thirty-nine, the said Pugh, for a valid consideration, conveyed to your orator, by a deed of that date, all her title and claim to the said premises, both in law and equity. Your orator further shows that he has, at various times, purchased the interest and claims of the brothers and sisters of William Barr, senior, and

their heirs, in and to the said quarter section of land, from
38 whom he has obtained deeds in due form of law, which deeds
are to be found recorded in the book of deeds of the county aforesaid. Your orator, therefore, claims that he ought of right to

be permitted to hold this portion of said quarter section of which he is now in possession, free from the molestation or claim of the said trustees, or either of them, or any one claiming under them by reason of anything contained in the will of William Barr, senior, deceased. And your orator had well hoped that he would have been so permitted to hold the said premises. But now, as it is, the said John B. Enness, the surviving trustee, contriving and confederating with David M. Barr, William V. Barr, Mary Barr, William J. Van Horne and Margaret R., his wife, John Spencer and Susan S., his wife, Alexander Findley and Ann Ellen, his wife, (said David, William, and Mary Barr, Margaret R. Van Horne, Susan S. Spencer, and Ann Ellen Findley being the children and legal representatives of William Barr, jr., deceased,) and with Richard B. Keys, William B. Wilson and Mary B., his wife, (said Richard B. Keys and Mary B. Wilson, being the children and legal representatives of James Keys, deceased,) all of whom your orator prays may be made defendants to this bill; and contriving how to wrong and injure your orator in the premises, they refuse to permit him to remain in peaceable and quiet possession of the land which he now holds, two alleging and pretending that the said devise to the child of John M. Barr failed by reason of the death of said child, and claiming that the said land passed to them as residuary legatees under the will of William Barr, senior; or in some other manner to your orator unknown the said defendants threaten to disturb your orator in the possession of said land by a suit at law for the recovery of the same, thus depriving your orator of that full and perfect enjoyment of said land to which he is justly entitled, and throwing a cloud over his title thereto, all which actings, doings, and pretences are contrary to equity and good conscience, and tend to the manifest wrong and oppression of your orator. In consideration whereof, and forasmuch as he is remediless in the premises according to the strict rules of the common law, and can only have relief in a court of equity where matters of this nature are cognizable; to the end, therefore, that the said John B. Enness, David M. Barr, William V. Barr, Mary Barr, William J. Van Horn and Margaret R., his wife, John Spencer and Susan S., his wife, Alexander Findley and Ann Ellen, his wife, Richard B. Keys, William B. Wilson and Mary B., his wife, may, upon their corporal oaths, full, true, and perfect answers make to all and singular the matters hereinbefore stated and charged, as fully and particularly as if the same were hereinafter repeated, and they thereunto particularly interrogated, and that not only to the best of their respective knowledge and remembrance, but also to the best of their information, hearsay, and belief. Your orator prays that the writ of subpœna may issue against the said defendants, commanding them and each of them to appear and answer as aforesaid; and your orator further prays that upon the final hearing of this cause a proper construction may be given to the will of William Barr, senior, so far as it relates to the property in question, that the said defendants may be perpetually enjoined by a claim of this honorable court from asserting any title to the said property by reason of anything

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contained in the said will, or in any manner disturbing your orator in the peaceable possession of the same, or in case any title should be found in them, that they be specifically decreed to convey the same to your orator, and that your orator may have such other and further relief in the premises as equity and good conscience may require.

MITCHELL & PENDLETON, *Solicitors.*

Copy of the will of William Barr, senior, referred to in the bill as marked A.

In the name of God, amen! I, William Barr, senior, of the town of Cincinnati, State of Ohio, being old and feeble of body, but of sound and disposing mind, memory, and judgment, praised be God for the same, do make and declare this my last will and testament, in manner and form following: that is to say, I give and divise to my sons-in-law, Wm. Burr, James Keys, and John B. Enness, of Cincinnati aforesaid, and to their heirs, all and singular that certain farm or parcel of land situate, lying, and being in the county of Hamilton, and State of Ohio, which I purchased of John Cross, containing one hundred and ninety acres, to hold the same to them and their heirs in trust, first, for the use of my son, John M. Barr, during his natural life, but nevertheless to permit and suffer my son, John M. Barr, to hold, use, occupy, possess, and enjoy the said farm, and to receive and take the rents and profits thereof during his natural life, and in case my said son, John M. Barr, should die leaving a legitimate child or children, then also in trust for Maria Barr, wife of said John M. Barr, in case she survive him, during her natural life, for the purpose of maintaining herself and the said child or children, and educating the said children, but nevertheless to permit and
41 suffer the said Maria Barr, wife of the said John M. Barr, to hold, use, occupy, possess, and enjoy the said farm, and to receive and take the rents and profits thereof during her natural life; and upon the decease of the said Maria Barr, wife of the said John M. Barr, in case she survive him, if not, then upon the decease of the said John M. Barr, I do further give and devise the remainder of my estate in said farm unto the legitimate child or children of the said John M. Barr, and their heirs forever. If my said son have but one child as aforesaid, then I give and devise said farm to him or her or his or her heirs forever. But if he have two or more children, then I give and devise the said farm unto said children and their heirs forever, to be equally divided between them. But should my son, John M. Barr, die without having any issue of his body, then and in that case I do give and devise the remainder of my estate in said farm unto my said sons-in-law, William Barr, James Keys, and John B. Enness, and their heirs forever. And if the present wife of my son, John M. Barr, should survive him, the said John M. Barr dying without leaving any legitimate issue, then I direct my said sons-in-law, their executors and administrators, to pay or cause to be paid unto her yearly, and every year during her widowhood, the sum of two hundred dollars; and if during her widowhood she should

again be lawfully married, then I further direct my said sons-in-law, their heirs, executors, or administrators, to pay or cause to be paid unto her the sum of one thousand dollars, unless the personal estate of my said son, John M. Barr, at his death shall exceed the sum of four thousand dollars, then whatever the personal estate shall exceed the last-mentioned sum shall be taken and deducted from the said sum of one thousand dollars, the said annuity or gift at mar-
42 riage, or either, to be paid out of my personal estate; and I do further devise my executors hereinafter named to finish or cause to be finished in a plain manner the house and kitchen erected on the farm aforesaid, for the use and occupation of the said John M. Barr, as soon after my decease as it is practicable, the said expenses to be defrayed out of such parts of my personal estate as are not especially bequeathed. Also, I do hereby empower and direct my executors hereinafter named to apply the proceeds of a debt due to me, when collected, by one Joseph McKinney, of the State of Pennsylvania, of two thousand fifty-one dollars and fifty-four cents, and the interest due or to grow due thereon; as also the proceeds of a debt due to me, when collected, by one Frederic Barr, of the State of Pennsylvania, of nine thousand five hundred and thirty-seven dollars and fifty-two cents, and the interest due or to grow due thereon, together with the proceeds of the sale of my house and lot in the town of Shippensburgh, in the State of Pennsylvania, amounting to the sum of five hundred dollars, or so much thereof as may be necessary towards the payment in full of the one hundred shares which I have purchased in the Miami Exporting Company Bank of Cincinnati, Ohio. Also, I give and bequeath unto my beloved wife, Mary Barr, the entire income or dividend on the said one hundred shares in the Miami Exporting Company, as well after as before the payments thereon are completed, subject nevertheless and charged with an annuity to our beloved son, John M. Barr, of the sum of fifty dollars yearly during his natural life, the first sum of fifty dollars to be paid in advance within three months after my death, and thenceforward at the expiration of each year from the date of such payment
43 until his decease. After the decease of my beloved wife I will and bequeath the dividends of the said one hundred shares to be equally divided between my sons-in-law, their heirs, executors, or administrators, subject nevertheless to the annuity of my son, John M. Barr, in case he survive my said wife. Also, I do further give and bequeath unto my beloved wife, Mary Barr, all my household furniture, to be held absolutely as her own property. Also, I give and bequeath to my grandson, William Barr Keys, my gold watch. Also, I do further give and bequeath the remainder of my estate, both real and personal, unto my sons-in-law, James Keys, William Barr, and John B. Enness. Also, I direct my executors to pay my just debts, and all testimentary and other incidental expenses. Also, I will and appoint said William Barr, James Keys, and John B. Enness, and the survivor or survivors of them, executors of this my last will and testament, hereby revoking and making void all and other will or wills at any time heretofore by me made. And

I do declare this to be my last will and testament. In witness whereof, I, the said William Barr, senior, have hereunto set my hand and seal this the twenty-fourth day of February, 1816.

WILLIAM BARR. [SEAL.]

Signed, sealed, acknowledged, published, and declared, by the said William Burr, senior, as his last will and testament, in the presence of us.

D. WADE.
FRANCIS CARR.
DAVID MCKNIGHT.

The above will was duly formed and admitted to record at the July term, 1816, in the court of common pleas for Hamilton county, Ohio, as appears by the following copy of the clerk's certificate, viz:

STATE OF OHIO, *Hamilton county, ss:*

Be it remembered, that, at the term of July, 1816, of the court of common pleas of said county, personally appeared in open court, D. Wade, Francis Carr, and David McKnight, subscribing witnesses to the above will, who being duly sworn declare on oath that they were present when the above-named testator signed and acknowledged the foregoing to be his last will and testament at the time of signing and acknowledging the same, and that they subscribed the same as witnesses thereto.

44

(Signed) JOHN S. GENO.

On the back of the foregoing bill is the following precipe, to wit:

Precipe.

Issue subpœna for John B. Enness, David M. Burr, William V. Burr, Mary Burr, William Van Horn, and Margaret R., his wife, John Spencer, and Susan S., his wife, Alexander Findlay, and Ann Ellen, his wife, Richard E. Keys, William B. Wilson, and Mary B., his wife.

MITCHELL & PENDLETON,
Complain'ts Sol's.

And thereupon the writ of subpœna issued directed to the sheriff of Hamilton county, clothed in the words and figures following to wit:

Subpœna in ch'y.

STATE OF OHIO, *Hamilton county, ss:*

To Thomas J. Weaver, sheriff of our said county, greeting:

We command you that you summon John B. Enness, David M. Burr, William V. Burr, Mary Burr, William J. Van Horn, and Margaret R., his wife, John Spencer, and Susan his wife, Alexander Findlay, and Ann Ellen, his wife, Richard E. Keys, William B. Wilson, and Mary B., his wife, to appear before the Hon. William Johnston, judge of

the superior court of Cincinnati, forthwith to answer a petition of chancery exhibited against them by Ephraim Morgan. And this they shall in nowise omit, under the penalty of one thousand dollars, and have then there this writ.

In witness whereof, have hereunto set my hand and affixed the seal of the said court at Cincinnati, this 20 day of April, A. D. 1847.

DAN'L GANO,
Clerk Superior Court of Cincinnati,
By JAS. H. SAYRE, *Deputy.*

Said subpœna is indorsed as follows, to wit:

Indorsed: Subpœna in chancery, to January T., 1847, (forthwith.)

The following is the sheriff's return indorsed on the back of
45 the writ, to wit:

Return.

1847, April 22, served by copy personally on Wm. J. Van Horn and wife, and by copy at the residence of John B. Enness, and service acknowledged for all the other defendants by Spencer & Corwin.

T. J. WEAVER, *Sheriff.*

We acknowledge service of the within writ for all of the within-named defendants except John B. Enness and Wm. J. Van Horn, and Margaret, his wife, April 21st, 1847.

SPENCER & CORWIN, *Att's.*

And cause is to the next, to wit, to the term of June, continued Sept. 22, A. D. 1847, demurrer of Enness filed, which said demurrer is clothed in the words and figures following, to wit:

Dem'r of Enness.

JOHN B. ENNESS *et al.* *ags* EPHRAIM MORGAN. } In ch'y.

And the said John B. Enness comes and demurs to the said bill of complainant, and says that the matters and things therein so set forth are insufficient to maintain the said suit, and that there is no equity therein; wherefore he prays that the said bill may be dismissed.

STORRES & GWYNNE, *Sol's.*

And cause from term to term, to wit, to the term of January, A. D. 1851, continued.

January 27, A. D. 1851, answer of Enness filed, which said answer is clothed in the words and figures following, to wit:

Answer of Enness.

The separate answer of John B. Enness to the bill of complaint filed against himself and others by Ephraim Morgan.

The said John B. Enness comes, and, not waiving exceptions to the manifest errors in said bill contained, answers and says that he admits that William Burr, senior, was during his lifetime seized and pos-

sessed in fee simple of the premises in said bill set forth, and that he departed this life in the month of May, A. D. 1816. He further admits that the said William Burr, senior, executed the will, a copy of which, marked A, is appended to the bill, which was duly
46 admitted to probate; that John M. Barr died intestate, on a day not now stated or known to this defendant, having only one child, an infant daughter, his wife still surviving, and that said infant daughter also died intestate and without issue, Maria Bar still surviving, but the exact date of her death he cannot state. He further admits that said Maria subsequently intermarried with John Bigelow, who has since deceased, and that said Maria is still living. He further states that he has understood that said Maria Bigelow conveyed to said Morgan and Lot Pugh her life-interest, and that said Pugh afterwards conveyed the same to said Morgan; but, as he is unable to say whether said conveyances are good and valid in law, he requires that the same shall be produced and proven on the hearing thereof. He further states that he does not know of the conveyances by the complainant set forth in the bill, and requires proof thereof. He further says that he does not threaten, and has not threatened, to disturb said Morgan in the possession of said land by a writ for the recovery of the same during the lifetime of said Maria Bigelow, and the defendant desires the rights of the said complainant to maintain his said bill against this defendant.

This defendant further answers that he does not know and cannot state whether said complainant has received conveyances of the titles of the brothers and sisters of William Barr, senior, and requires proof thereof. He further states that he is advised that said brothers and sisters, or their assignees, will have no right in law or equity to said premises, even after the death of the said Maria Bigelow, and
47 therefor , the present at least, no one has or claims a right thereto save Maria or her assignee. And having fully answered, he prays to be hence dismissed with his costs, &c.

STORRER & GWYNNE,
Sol's for Jno. B. Enness.

STATE OF OHIO, *Hamilton county, ss:*

The above-named John B. Enness, being duly sworn, says that the matters and things in the above-contained, are true.

And cause is to the term of October, A. D. 1851, continued.

And now here, to wit, on the 30 day of December, in said term of October, of said court and year aforesaid, the following decree was had and entered herein, to wit:

M. 134.—*Decree.*

This cause coming on to be heard on the bill and answer of John B. Enness, it is ordered that, as to John B. Enness, said bill be dismissed, and that as to the other defendants said bill be dismissed without prejudice to the rights of the complainant, or costs of complainant.

Decree for same and execution awarded. Notice of appeal by complainant.

STATE OF OHIO, *Hamilton county, ss:—Ham. com. pleas:*

I, Benjamin J. Horton, clerk of the court of common pleas within and for the county of Hamilton aforesaid, do hereby certify the above and foregoing to be a full and correct transcript of the record of the within stated case No. 438, as the same appears from the files and journals of the old superior court of Cincinnati, the said court having been abolished by law, and the records and files of the same transferred to my office, agreeably to the constitution and laws of the State of Ohio, and now remaining in my office.

Witness my hand and the seal of the said court, at Cincinnati, this 10 day of October, A. D. 1865.

[SEAL.] B. J. HORTON,
Clerk Court of Common Pleas Ham. Co., Ohio.

[5-cent revenue stamp]

48 EXHIBIT C, (referred to in agreed statements of facts.)

Pleas at Cincinnati, and county of Hamilton, and State of Ohio, before the honorable George Hoadly, jr., esq., judge of the supreme court of Cincinnati in and for said county, for the term of April, A. D. eighteen hundred and fifty-two.

ADAM MOORE
vs.
JOHN B. ENNESS, DAVID M. BARR, WILLIAM V. Barr, Mary Barr, William J. Van Horn and Margaret R., his wife, John Spencer and Susan S., his wife, Alexander Findlay and Ann Ellen, his wife, Richard E. Keys, William B. Wilson and Mary B., his wife. } Chancery J. 437.

Heretofore, to wit, on the 20 April, A. D. 1847, came the above-named complainant by his solicitors, and filed his certain bill of complaint against the above-named defendants, whereupon the writ of subpœna issued, which was duly returned by the sheriff with the following report thereon, to wit:

Report of sheriff.

April 22, 1847, served by copy personally on William J. Van Horn and wife, and by copy at the residence of John B. Enness. and service acknowledged for all the other defendants by Spencer & Corwin.

THOS. J. WEAVER, *Sheriff.*

Cause continued to October term Oct. 22, A. D. 1847.

Demurrer filed by Enness; cause continued to October term, 1851, and then on the 30 Dec., 1851.

Order of court.

The following was had and entered, to wit:

It appears to the court that since the commencement of this suit, and about the 28th day of Dec., 1847, the said compl't, Adam Moore, has departed this life, leaving as his heirs at law the following named persons, to wit: Caroline Young, wife of John Young, Frederick A. Schwartz, Annie Maria Vattier, wife of John L. Vattier, Eliza M. Moore, Agnes Ann Ferguson, wife of Edward A. Ferguson, and William H. Moore, Adam Moore, Rebecca Ann Miller, wife of Francis C. Miller, Frederick Moore, Margaret Moore, Georgiana Moore, and Francis Moore. It is ordered that said heirs, together with their husbands, be made parties comp't in this bill. And for fur-
49 ther proceedings this cause is continued.

Cause con'd to April term, 1852.

And now here, to wit, on the 17th Ap'l term, last aforesaid, the following final decree had and entered, to wit:

Demurrer sustained. Bill dismissed, at comp'ts costs. Decree for same and execution awarded.

GEO. HOADLEY, Jr.

THE STATE OF OHIO, *Hamilton county, ss.—Com. pleas:*

I, B. J. Horton, clerk of the court of common pleas, within and for said county of Hamilton, do hereby certify the above and foregoing to be a full and correct transcript of the proceedings and judgment had in the within stated case, No. 437, as the same appears recorded in the records of the old superior court of Cincinnati, No. 13, page 531, the same having been abolished by law, and the records and files of said court transferred to my office, agreeably to the constitution and laws of the State of Ohio, and now remaining in my office.

Witness my hand and the seal of the said court, at Cincinnati, this 5th day of October, A. D. 1864.

B. J. HORTON,
Clerk Court Com. Pleas, Ham. Co., Ohio.

EXHIBIT D, (referred to in agreed statement of facts.)

Pleas at a separate session of the court of common pleas in and for the first district, begun and held at the court-house, in the city of Cincinnati, and county of Hamilton, and State of Ohio, at the January term, in the year of our Lord one thousand eight hundred and fifty-nine, before the honorable W. M. Dickson, one of the judges of the said court.

Petition to perpetuate testimony, 17,870.

Hamilton county, court com. pleas.

EPHRAIM MORGAN, MARY V. WOOD, JOHN Young and Caroline, his wife, John B. Purcell, E. Henry Carter, and James T. Morgan

against

JOHN B. ENNESS, DAVID M. BURR, MARGARET Gwynne, Alexander Findley and Ann Ellen Findley, his wife Mary Burr, a lunatic, Ellen B. Burr, James B. Burr, and Alexander F. Burr, the last three named infant children of William V. Burr, deceased, Susan Spencer, Samuel B. Keys, Richard M. Keys, Samuel J. Thompson and Eveline, his wife, John Sterritt, Benjamin Sterritt, jr., Margaret Titus, and John Titus, her husband, children of Jane R. Sterritt, deceased, Henry Lardner, son of Mary Lardner, deceased, James K. Wilson and Virginia Wilson, his wife, William B. Wilson, Joseph H. Wilson, Richard A. Wilson, Mary Frances Wilson, and Ella S. Wilson, children of Mary B. Wilson, and grandchildren of James Keys, deceased.

Be it remembered that heretofore, to wit, on the 29 day of June, in the year eighteen hundred and fifty-eight, came the said plaintiffs, by their attorneys, and filed in the office of the clerk of said court their certain petition, in the words and figures following, to wit:

Petition.

To the honorable the court of common pleas of Hamilton county.

Your petitioner, Ephraim Morgan, Mary V. Wood, Patrick Considine, John Young and Caroline Young, his wife, E. Henry Carter, John B. Purcell, and James T. Morgan, respectfully represent that on the 26th day of July, in the year eighteen hundred and thirty-eight, Maria Bigelow, of Hamilton county, conveyed to Ephraim Morgan and one Lot Pugh, now deceased, all her right, title, and interest, being a life estate, in the following described real estate, situated in Storr's township, in the county of Hamilton and State of Ohio, to wit, the northeast quarter of section No. thirty-six, (36,) in township No. 4, in the first fractional range in the Miami purchase, by deed recorded in the book No. 67, page 629, of the recorder's office of said county; that afterwards, on the 13th day of September, in the year 1839, the said Lot Pugh conveyed to your petitioner, Ephraim Morgan, all his interest and title in the said tract of land, by

deed recorded in book 73, page 163, of said recorder's office; that your petitioner, the said Ephraim Morgan, being then pos-
51 sessed of the life estate of said Maria Bigelow, and being advised that, under the statutes of descent then in force in the statutes of Ohio, the remainder of said estate was vested in the brothers and sisters of William Burr, deceased, formerly of Chambersburg, Pennsylvania, and their decendants, by inheritance from a child of said Maria Bigelow, born whilst she was the wife of John M. Burr, deceased, a grandchild of said William Burr, senior, and which child died in infancy, but after the death of said John M. Barr, its father proceeded to purchase, and through his agent, William Wood, deceased, and otherwise, did actually purchase the interests of nearly all of said brothers and sisters of William Burr, senior, all their descendants and legal heirs, and now hold their deed for said tract of land, made either directly or indirectly as aforesaid; that since said purchase your petitioner, the said Ephraim Morgan, has, at various dates, conveyed portions of said tract of land to his co-petitioners, Mary V. Wood, Patrick Considine, who now hold the same under his conveyance; and that the other co-petitioners, John B. Purcell, John Young, and Caroline his wife, and E. Henry Carter, hold other portions of said tract under conveyances from other persons who received deeds from said Ephraim Morgan; that for the purpose of sustaining the title under which your petitioners claim, it is necessary to take the deposition of said Maria Bigelow, as to the time of the death of her former husband, the said John M. Burr, and the birth and the death of their said child, and also as to the relationship of the various persons who made conveyances to the said Ephraim Morgan as aforesaid, to the brothers and sisters of said William Burr, senior, of Chambersburg, and the other matter referred to in the interrogatories hereinafter propounded. Your petitioners
52 further state that they expect to be made defendants to an action for the recovery of said real estate, to be brought by the persons hereinafter named, as interested, or some one or more of them, immediately upon the death of Maria Bigelow, in some court of Hamilton county; and that said suit cannot be brought until after her death, for the reason that the title to her life estate is not disputed. Your petitioners state the names of the persons whom they know or believe to be interested in the subject-matter of this petition, as following, to wit: John B. Enness. David M. Burr, Margaret Gwynne, Alexander Find' and Ann Ellen Finley, his wife, Mary Burr, (a lunatic,) Ellen Burr, and Alexander F. Burr, the last three named infant children of William V. Burr deceased, Susan Spencer, Samuel B. Keys, Richard W. Keys, Samuel J. Thompson and Eveline, his wife, John Sterritt, Benjamin Sterritt, jr., Margaret Titus and John Titus, her husband, children of Jane B. Sterritt, deceased, Henry Lardner, son of Mary Lardner, deceased, and James K. Wilson and Virginia Wilson, his wife, and William B. Wilson, Joseph H. Wilson, Richard W. Wilson, Mary Nancy Wilson, and Ellen T. Wilson, children of Mary B. Wilson, and grandchildren of James Keys, deceased.

Your petitioners therefore pray that a proper order may be made under the statute authorizing them to take the deposition of said Maria Bigelow, in respect to the following interrogatories:

Question. 1. What is your age?

Ques. 2. Were you or not married to John M. Burr? If yea, state when.

Ques. 3. When did your husband, John M. Burr, die?

Ques. 4. Was there any child or children born to you and the said John M. Burr during your said marriage or after his death; and if so, how many?

Ques. 5. Where was said child born, and where did he die, if at all?

Ques. 6. Please state, if you know, whether William Barr,
53 senior, the father of John M. Barr, dec'd, had any brothers or sisters; and if yea, how many, and what were their names? Please also to state, if you know, whether which of them are dead, or which are a living, if any.

Ques. 7. If any of the sisters of William Barr, senior, of Chambersburg, were married, please state to whom they were married, and where they lived.

Ques. 8. Please to state, if you know, whether any of the brothers or sisters of William Barr, senior, the father of John M. Barr, died, leaving children? If so, please state, as fully as you can, how many children each of them left, and the names of such children as far as you know them; if they left daughters, state whether said daughters were married, and if so, to whom.

Ques. 9. Please state, if you know, whether any of the brothers or sisters of William Barr, senior, died without leaving children or other descendants; and if so, which of them so died.

Ques. 10. Please state, if you know it, what relationship, if any, the following named persons bore to the brothers or sisters of William Barr, senior, of Chambersburg, Pennsylvania, the father of John M. Barr, to wit, Samuel Barr and Catherine B., his wife, Andrew Barr and Nancy, his wife, John Barr and Nancy, his wife, Wilson Lindsey and Rebecca, his wife, of Franklin county, Ohio; John McWhister and Alison, his wife, of Chambersburg, Pennsylvania; George Sexton and Rachel, his wife, of Westmoreland county, Pennsylvania; William McDowell and Jane, his wife, Mary Barr, widow of James McElroy, and Susan, his wife, of Westmoreland county, of Pennsylvania; Isaac Donaldson and Mary, his wife, of Mercer county, Pennsylvania; Samuel McWhister and Margaret, his wife, of Carroll, county, Ohio; Betsy J. Barr, of Richland county, Ohio; Robert McWhister, of Green county, Indiana, Fulton
54 Lindsey and Jane, his wife, and Matthew N. Morehead and Elizabeth, his wife, children of James Lindsey, of Franklin county, Ohio; Thomas Barr, of Fairfield county, Ohio; Martha A. Lidsey, of Franklin county, Ohio; James Lindsey and Ann Elizabeth Lindsey, his wife, and Jane Caroline Lindsey, of Franklin county, Ohio; Mary Craig, of Gallatin county, Kentucky; Ann Ellison, of Adams county, Ohio.

EDMUND PENDLETON, *Att'y.*

STATE OF OHIO, *Hamilton county, ss:*

Edmund Pendleton, being duly sworn, says that he is the duly authorized agent and attorney of the above-named petitioners; that the facts stated in the foregoing petition are within his personal knowledge, and are more particularly and better known to him than to the said petitioners themselves, and that he believes the facts therein stated to be true.

EDMUND PENDLETON.

Sworn to and subscribed before me this 25th June, 1858.

R. H. STONE, *Cl'k.*
JNO. PUGH, *Deputy.*

And also, to wit, on the 29th day of June, A. D. 1858, at the term of May, the following entry was made, and entered in the journal of said court, to wit:

Order to perpetuate testimony, min. 231.

EPHRAIM MORGAN and OTHERS
against
JOHN P. ENNESS and OTHERS.

The plaintiffs, Ephraim Morgan, Mary V. Wood, John Young, and Caroline, his wife, John B. Purcell, E. Henry Carter, and James T. Morgan, having filed their petition herein, duly verified, asking an order for the taking and perpetuation of the testimony of Maria Bigelow, in accordance with the statute, and the court having carefully examined said petition, and finding the same to be in accordance with law, it is ordered and adjudged that the petitioners be allowed to take the deposition of said Maria Bigelow in answer to the interrogatories contained in said petition; and it is ordered that said deposition be taken at the office of Frank Ernst, a justice of the
55 peace, in Hull creek township, Hamilton county, Ohio, on the 12th day of August, 1858, between the hours of eight a. m. and six p. m., and if not completed on that day to be continued from time to time as may be convenient, by adjournments, if not more than ten days, as shall be fixed by the officer taking the same.

And it is ordered that the petitioner be required to give personal written notice to John B. Enness, David M. Barr, Margaret Gwynne, Alexander Findley and Ann Ellen Findley, his wife, Samuel B. Keys, individually, and as guardian of Mary Barr, (a lunatic,) Susan Spencer, Richard M. Keys, Samuel J. Thompson and Eveline, his wife, John Sterritt, Benjamin Sterrit, jr., Margaret Titus and John Titus, her husband, James B. K. Wilson and Virginia Wilson, his wife, William B. Wilson, Joseph H. Wilson, Richard A. Wilson, and Mary Frances Wilson, and Ellen F. Wilson, of the time and place of taking said depositions, at least two weeks before taking the same, and that a like notice be published in the Daily Cincinnati Enquirer, a newspaper of general circulation, published in the city of Cincinnati, for four weeks, consecutively, prior to taking said depositions.

And it appearing to the court that personal service cannot be had on Ellen B. Barr, James B. Barr, Alexander F. Barr, children of William N. Barr, who are minors, residing somewhere in the State of Illinois, and on Henry Lardner, the court hereby appoints John W. Henen, esq., or, in his absence, Isaac C. Collins, esq., as their attorney, and also as attorney in behalf of said Mary Barr, (lunatic,) and such others of said defendants as are minors, to represent them at the taking of said depositions, and to examine the petition herein filed, and to prepare cross-interrogatories.

And it is further ordered that the petitioner give said attorneys two weeks' notice, at least, of their appointment and of
55 the taking of said depositions.

And now here, to wit, on the 12th day of August, A. D. 1858, the following cross-interrogatories were filed in the office of the clerk of said court, to wit:

Cross-interrogatories filed and propounded by J. C. Collins, esq., who, in the absence of John W. Henen, esq., appears as attorney and counsel, in accordance with the order of court, for Ellen N. Barr, James N. Barr, Alexander F. Barr, children of William N. Barr, dec'd, and Mary Barr, (a lunatic,) and others.

Question 1. You will please to state whether the child to whom you have referred to as the child of John M. Barr and yourself died before or after the death of her father.

And now here, to wit, this cause is continued to November term, A. D. 1858.

And after, to wit, on the first day of December, A. D. 1858, came the said petitioners, by their attorney, and filed in the office of the cl'k of said court, their certain motion to confirm proceedings, as follows, to wit:

And now come the petitioners above named, and by their counsel move the court to confirm the proceedings of Franklin Ernst, J. P., in taking the depositions of Maria Bigelow, approve the said depositions, order it to be filed for the perpetuation of her testimony, &c.

EDMUND PENDLETON,
Att'y for Petitioners.

And now here, to wit, this cause is continued to January term, A. D. 1859.

And now here, to wit, on the 14th day of January, A. D. 1859, at the term last aforesaid, the following entry was made and entered on the journal of said court, to wit:

EPHRAIM MORGAN and OTHERS
against
ENNESS and OTHERS. } No. 289.

On motion of the plaintiffs, the court having examined the proceedings heretofore had, and being satisfied that the depositions heretofore taken in the cause have been properly taken, and in conform-
57 ity to the statute and the order of the court, approve of the same, and order them to be filed.

It is further ordered that the plaintiffs pay the costs of this action, including twenty-five dollars to Collins and Henen for filing the cross-interrogatories.

THE STATE OF OHIO, *Hamilton county, ss.—Ham. com. pleas:*

I, Benj. J. Horton, cl'k of the court of common pleas within and for said county of Hamilton, do hereby certify the above and foregoing to be a full and correct transcript of the proceedings and judgment had in said court in the within-stated case, No. 17,870, as the same appears recorded in the records of said court, vol. 259, page 209, in my office remaining.

Witness my hand and the seal of the said court, at Cincinnati, this 5 day of October, A. D. 1864.

[SEAL.] B. J. HORTON,
Clerk Court of Com. Pleas, Ham. Co., Ohio.

[5-cent rev. stamp.]

EXHIBIT No. 1, (referred to in agreed statement of facts.)

Deed of trust—Jno. B. Enness to David Sandige.

Whereas I, John B. Enness, of the town of Cincinnati, Hamilton county and State of Ohio, received from the late William Barr, senior, of the town of Shippensburg, Cumberland county and State of Pennsylvania, at different times after my marriage with his daughter, Susan, cash and property to the amount of nine thousand dollars as her proportion or interest in his estate, which property has been chiefly made use of in improving property in the town of Cincinnati, by s'd John B. Enness, and which has been given up to pay his debts; therefore, being anxious to receive to my said wife, Susan, the said sum of nine thousand dollars: This indenture, made the twelfth day of June, in the year of our Lord one thousand eight hundred and twenty-two, between me the aforesaid John B. Enness, of the one
58 part, and David Sandige, of the other part, witnesseth, that the said John B. Enness for and in consideration of the said sum of nine thousand dollars as aforesaid received, and for and in consideration of the further sum of five dollars, lawful money of the United States, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, conveyed, and confirmed, and by these presents doth grant, bargain, sell, convey, and confirm, unto the said David Sandige, and his heirs, forever, all that certain piece or parcel of land situate, lying, and being in Cumberland county, in the town or adjoining the town of Shippensburg, in said county of Cumberland and State of Pennsylvania, it being a tract of land devised to William Barr, James Keys, and John B. Enness, by the late William Barr, sen'r, dec'd, containing one hundred and sixty acres, more or less, of which I, the said John B. Enness, am possessed of one equal undivided one-third part of said tract of land; the said tract of land adjoins the road leading from Shippensburg to Balt'o, and adjoining the turnpike road leading to the city of Philadelphia, and all the estate, right, title, interest, claim, and demand of the said John B. Enness,

of, in and to the premises hereby bargained and sold, and every part or parcel thereof, together with all and singular the rights, members, privileges, and appurtenances to the same belonging or in anywise appertaining. To have and to hold the premises aforesaid, hereby granted, bargained, and sold, or meant or intended so to be, with all the appurtenances, to the only proper use and benefit and behalf of Susan Enness, wife of the said John B. Enness, and her heirs, forever. And the said John B. Enness, for himself, his heirs, executors, and administrators, doth covenant, grant, and agree to and with
59 the said David Sandage, that he is the true and lawful owner of the premises hereby granted, and that good right, full power, and lawful authority to sell and convey the same, in manner and form aforesaid; and further, he, the said J. B. Enness, his heirs, executors, and administrators, will warrant and forever defend the aforesaid premises, with all their appurtenances, and every part and parcel thereof, unto the said David Sandige, and his heirs, against all persons claiming or to claim by, from, or under him, them, or any of them, or by, from, or under any other person or persons whomsoever.

In witness whereof, the said John B. Enness has hereunto set his hand and seal, the day and year within written.

JOHN B. ENNESS. [SEAL.]

Witness present:
JOHN MAHARD.
JAMES GLENN.

THE STATE OF OHIO, *Hamilton county, ss:*

Before me, John Mahard, a justice of the peace, in and for the said county, personally appeared John B. Enness, the within-named grantor, and acknowledged the within instrument of writing to be his voluntary act and deed, for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto set my hand and seal, this 13th day of June, 1822.

[SEAL.] JOHN MAHART, *J. P.*

THE STATE OF OHIO, *Hamilton county, ss:*

I, Daniel Gam, cl'k of the court of common pleas within and for the county of Hamilton aforesaid, do hereby certify that John Mahart, esq., before whom the foregoing acknowledgment of John B. Enness was taken, and whose certificate thereof is attached, is and was at at that time an acting justice of the peace within and for the county of Hamilton aforesaid, duly elected, commissioned, and sworn into office, and to all his official acts as such full faith and credit are due and ought to be given.

In testimony whereof, I have hereunto set my hand and
60 affixed the seal of our said court, at Cincinnati, this 14th day of June, anno Domini 1822. Entered 7th August, 1822.

DANIEL GAM, *Cl'k.*

Compared with originals.

F. STARRETTY, *Rec'd.*

CUMBERLAND COUNTY, *ss:*

I certify the foregoing to be a true copy from the record.

In testimony whereof, I have hereunto set my hand and affixed the seal of the recorder's office, at Carlisle, this 26th day of June, A. D. 1865.

[SEAL.] E. COMMAN, *Recorder.*

EXHIBIT No. 2, (referred to in agreed statement of facts.)

Deed No. 2—William Barr and wife to Frederic Boas.

This indenture, made the third day of May, in the year of our Lord one thousand eight hundred and fourteen, between William Barr, of the town of Shippensburg, county of Cumberland, State of Pennsylvania, and Mary, his wife, of the one part, and Frederic Boas, of the town of Harrisburg, county of Dauphin, and State aforesaid, of the other part, witnesseth, that the said William Barr and Mary, his wife, for and in consideration of the sum of six hundred dollars, lawful money of Pennsylvania, to them in hand paid by the said Frederic Boas, at and before the ensealing and delivery hereof, the receipt and payment whereof they do hereby acknowledge, and thereof do acquit and forever discharge the said Frederick Boas, his heirs, executors, and administrators, by these presents have granted, bargained, sold, aliened, enfeoffed, released, and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, release, and confirm, under the said Frederic Boas, and to his heirs and assigns, all that certain lot or piece of ground, with the building thereon erected, situate on King's st., in the said town of Shippensburg, bounded and described as follows, viz: on the south by King street; on the west by lot No. 37; on the north by a fourteen feet alley; and on the east by lot No. twenty-five, containing in breadth on King st. sixty-four feet and four inches; and in depth two hun-
61 dred and seventy feet four inches, and marked in the general plan of said town with the No. 26, together with all and singular the houses, barns, out-houses, and other buildings thereon erected and being, and all liberties and privileges, advantages, hereditaments, and appurtenances whatsoever thereunto belonging or in anywise appertaining, and the reversions and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, use, trust, property, possession, claim, and demand whatsoever of them, the said William Barr and Mary his wife, in law, or equity, or otherwise howsoever, of, in, to, or out of the same. To have and to hold the said described lot of ground, hereditaments, and premises hereby granted and released, or mentioned, or intended so to be, with the appurtenances, unto the said Frederick Boas, his heirs and assigns, to the only proper use, benefit, and behoof of the said Frederick Boas, his heirs and assigns forever, and it being the same lot of ground which Edward Bard, by indenture therein, date the eighth day of May, in the year of our Lord one thousand eight hundred and thirteen, for the consideration therein mentioned, conveyed to said William Barr. And the said William Barr, for himself

his heirs, executors, and administrators, doth covenant, promise, grant, and agree to and with the said Frederic Boas, his heirs and assigns, by these presents, that he, the said William Barr, and his heirs, the said described lot of ground, hereditaments, and premises hereby granted and released, or mentioned, or intended so to be, with the appurtenances, unto the said Frederic Boas, his heirs and assigns, against him the said William Barr and his heirs, and against all and every other person or persons whomsoever lawfully claiming or to claim the same by, from, or under him or them, shall and war-
62 rant and forever defend by these presents.

In witness whereof, the said parties of these presents have hereunto interchangeably set their hand and seals. Dated the day and year first above written.

WILLIAM BARR. [SEAL.]
MARY BARR. [SEAL.]

Sealed and delivered in the presence of—
JNO. SIMPSON.
JOS. BARD.

Rec'd on the day of the date of the above indenture, of and from the above-named Frederic Boas, the sum of six hundred dollars in full for the consideration money above mentioned; witnesses present at signing.

WILLIAM BARR.

CUMBERLAND COUNTY, *to wit:*

Be it remembered that on the third day of May, in the year of our Lord one thousand eight hundred and fourteen, before me, the subscriber, one of the justices of the peace for said county, personally appeared the above mentioned William Barr and Mary, his wife, and the said William Barr did then and there acknowledge, in due form of law, that he had signed and sealed, and as, and for his act and deed, delivered the above indenture, and desired that the same might be recorded as such; and the said Mary Barr, wife of the said William Barr, being of full age, and by me separate and apart from her said husband examined, and the contents of the above deed having been by me made known to her, she, the said Mary Barr, upon such separate examination, declares that she did voluntarily and of her own free will and accord sign and seal, and, as her act and deed, deliver said deed without any coercion or compulsion of her said husband.

In testimony whereof, I have hereto set my hand and seal the same day and year.

JN. SIMPSON. [SEAL.]

Entered May 4, A. D. 1814.
Compared with the original.

CUMBERLAND COUNTY, *ss :*

I certify the foregoing to be a true copy from the record. In testimony whereof, I have hereunto set my hand and affixed the
63 seal of the recorder's office, at Carlisle, this 22d day of July, A. D. 1865.

[SEAL.] E. COMMON, *Recorder.*

EXHIBIT No. 3, (referred to in agreed statement of facts.)

Deed—William Barr and wife to Joseph McKinny.

This indenture, made the twenty-seventh day of May, in the year of our Lord one thousand eight hundred and fourteen, between William Barr, of Shippensburg, in the county of Cumberland, and State Pennsylvania, and Mary, his wife, of the one part, and Joseph McKinney, of the second part:

Whereas the honorable Edward Shippen and Joseph Shippen, esq., by indenture under their hands and seals, bearing date the fifth day of May, in the year of our Lord one thousand seven hundred and ninety-eight, for the consideration therein mentioned, did grant and confirm unto William Barr, (party hereto,) and to his heirs and assigns, a certain piece or lot of ground situate in the township of Shippensburg aforesaid, by marks and bounds in the same indenture particularly described, containing three acres and one hundred and fifty-three perches of land, with the appurtenances: to hold the same to him, his heirs, and assigns forever, as in and by said indenture intended to be recorded may more fully appear ; and whereas the said Edward Shippen and Joseph Shippen, esq'r's, by their indentures under their hand and seals, bearing date the fifth day of May, in the year of our Lord one thousand seven hundred and ninety-two, for the consideration therein mentioned, did grant and confirm unto the said William Barr, and to his heirs and assigns, a certain tract of land situate in the township of Shippensburg aforesaid, by marks and bounds in the said indenture particularly described, containing fifty acres of land, with the appurtenances, to hold the same
64 to him, his heirs and assigns forever, as in and by said indenture recorded at Carlisle, in (record book K, volume I, page 158,) relation being thereunto had more fully and at large appears ; and also, whereas Benjamin Reynold and Mildred, his wife, by indenture under their hands and seals, bearing date the 15th day of April, A. D. 1811, for the consideration therein mentioned, did grant and confirm unto the said William Barr, and to his heirs and assigns, a certain triangular piece of land adjoining the last mentioned tract, particularly described in said indenture, containing one acre and ten perches, with the appurtenances, to hold the same to him, his heirs and assigns forever:

Now, this indenture witnesseth, that the said William Barr and Mary, his wife, for and in consideration of the sum of five thousand four hundred and sixty-one dollars and eighty-seven ½ cents, to them in hand paid by the said Joseph McKinney, at and before the enseal-

ing and delivery hereof, the receipt of which they do hereby acknowledge, and thereof acquit and forever discharge the said Joseph McKinney, by these presents have granted, bargained, sold, aliened, enfeoffed, released, and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, release, and confirm, unto the said Joseph McKinney, and to his heirs and assigns, all those three certain lots or pieces of land situate as aforesaid, and lying contiguous to each other, bounded and described as follows, to wit: beginning at a post on road to middle spring; thence by same and Samuel Sturgeon's land, south 63 degrees, east 22 perches, eight-tenths, to a post; thence, by same and other land of said McKinney, south 26 degrees, east 68 perches seven-tenths, to post; thence, by land of
65 George Hamill, north thirty-seven degrees thirty minutes east nineteen perches one-tenth, to post; south forty-three degrees, east twenty-eight perches, to a rock; thence, by William McConnel's land, north thirty-eight degrees, east twenty-seven perches, to a stone; thence, by Dr. John Simpson's land, north fifty-eight degrees thirty minutes, west fifty-seven perches, to a post; north thirty-five degrees, east sixty-nine perches, to a post; thence, land of the heirs of David Mahin, north forty degrees, west forty-four perches, to a stone; north forty degrees, east forty eight perches five-tenths, to a white-oak; north fifty-eight degrees, west seventeen perches two-tenths, to a walnut; north forty degrees, west twenty-six perches five-tenths, to a post on James Wallace's land, and by same south forty-four degrees, west four perches, to a black-oak; south thirty-four degrees, west seventy-three perches, to a post in old stump on Archibald McEberha's land; thence, by same, south thirty-nine degrees, east twenty-six perches two-tenths, to a post, south thirty-four degrees, west fifty-six perches, to the place of beginning, containing fifty-five acres and forty-two perches nett measure; together with all and singular the improvements, ways, woods, waters, watercourses, rights, liberties, privileges, hereditaments, and appurtenances whatsoever thereto belonging or in anywise appertaining, and the reversions and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, claim, and demand whatsoever of them, the said William Barr and Mary, his wife, in law, or in equity, or otherwise howsoever, of, into, or out of the same. To have and to hold said lot of fifty-five acres and forty-two perches of land, hereditaments, and premises hereby granted, or mentioned, or intended so to be, with the appurtenances, unto the said
66 Joseph McKinney, his heirs and assigns forever; and the said William Barr, for himself, his heirs, executors, and administrators, doth covenant, promise, grant, and to and with the said Joseph McKinney, his heirs and assigns, by these presents, that he, the said William Barr and his heirs, the said above and described lot or piece of land, hereditaments, and premises hereby granted, or mentioned, or intended so to be, with the appurtenances, unto the said Joseph McKinney, his heirs and assigns, against him, the said William Barr and his heirs, and against all and every other person and persons whomsoever lawful claiming or to claim by, from, or under

him, them, or any of them, shall and will warrant and forever defend by these presents.

In witness of which, said parties to these presents have hereunto set their hands and seals interchangeably hereunto ; dated day and year above written.

WILLIAM BARR. [SEAL.]
MARY BARR. [SEAL.]

Sealed and delivered in the presence of—
S. JONES.
JOHN SCOTT.

Received the day and date of the above deed, from the within named Joseph McKinney, the sum of five thousand four hundred and sixty-one dollars and eighty-seven and one-half cts., being the full consideration-money above mentioned in full—I say received by me.

WILLIAM BARR.

Witness present at signing :
S. JONES.
JOHN SCOTT.

Memorandum.

COUNTY OF CUMBERLAND, *ss:*

This twenty-seventh day of May, in the year of our Lord one thousand eight hundred and fourteen, before me, John Scott, one of the justices of the peace of said county of Cumberland, residing and being in the town of Shippensburg, personally came the above named William Barr and Mary, his wife, and the said William Barr did then and there acknowledge, in due form of law, that he
67 had signed and sealed, and, as and for his act and deed, delivered the above deed, and desired that the same might be recorded as such ; and the said Mary Barr, being by me in due form of law examined separate and apart from her said husband, and the full contents of the above deed being by me first made known to her, she, the said Mary Barr, upon such separate examination as aforesaid, declared that she did voluntarily and of her own free will and accord seal, and, as her act and deed, deliver the said deed without any coercion or compulsion of her said husband.

In testimony of which, I, the said John Scott, have hereunto set my hand and seal the day and year above written.

[SEAL.] JOHN SCOTT.

Entered sixth August, A. D. 1816. Compared.

CUMBERLAND COUNTY, *ss :*

I certify the foregoing to be a true copy from the record.

In testimony whereof, I have hereunto set my hand and affixed the seal of the recorder's office, at Carlise, this twenty-fourth day of July, A. D. 1865.

[SEAL:] E. COMMON, *Recorder.*

[Five cent. rev. stamp.]

EXHIBIT No. 4, (referred to in agreed statement of facts.)

[*Deed—William Barr and wife to Frederick Boas.*

This indenture, made the third day of May, in the year of our Lord one thousand eight hundered and *and* fourteen, between William Barr, of the township of Shippensburg, county of Cumberland and State of Pennsylvania, and Mary, his wife, of the one part, and Frederick Boas, of the town of Harrisburg, county of Dauphin and State aforesaid, of the other part, witnesseth, that the said William Barr and Mary, his wife, for and in consideration of the sum of sixteen thousand and thirty-seven dollars and fifty cents, lawful money of the United States, to them in hand paid by the said Frederick
68 Boas, at and before the ensealing and delivery of these presents, the receipt whereof they, the said William Barr and Mary, his wife, do hereby acknowledge, have granted, bargained, sold, aliened, enfeoffed, released, and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, release, and confirm, to the said Frederick Boas, his heirs and assigns, a certain plantation and tract of land situate in Shippensburg township, in the county of Cumberland and State aforesaid, bounded and described as follows, viz: beginning at a post on the Baltimore road; thence by land of Dr. Alexander Steuart, north forty-five degrees and an half east, one hundred and sixty-three perches, to a black-oak; thence north forty-two degrees west, one hundred and nine perches, to a walnut; thence, by land of William Cowan, north fifty-four degrees and three-fourths west, twenty-two perches and five-tenths of a perch, to a locust; thence, by land of James Hanell, south sixty-five degrees west, twenty-three perches and five-tenths of a perch, to a white-oak; thence north twenty-nine degrees and one-half west, fourteen perches and five-tenths of a perch, to a white-oak on the Walnut Bottom road; thence, along said road by land of George McCandless, south seventy-four degrees west, fifty-five perches, to the Mount Rock road ; thence, along said road, south forty-five degrees, west twelve perches and five-tenths of a perch, to a lot of Isaac Miller; thence along the same, south forty-four degrees east, seventeen perches and nine tenths of a perch, along the back of some building lots, south forty-five degrees and an half, west, nineteen perches and four-tenths of a perch, to a fourteen feet alley ; thence south forty-five degrees east, four-tenths of a
69 perch; thence along a twenty-feet alley, by land of William McCowem and others, south forty-five degrees and an half west, sixteen perches and six-tenths of a perch, to a post; thence south forty-eight degrees west, nineteen perches and six-tenths of a perch, to a twenty-f't alley; thence, along the same, south forty-five degrees east, fourteen perches and five-tenths of a perch; thence north forty-five degrees east, two perches and one-half of a perch; thence, by land of the Rev. James Walker, south fifty-one degrees and one half, east nineteen perches; thence, by land of said Walker, south forty-four degrees west, twenty-four perches and eight-tenths of a perch; thence, by land of Walker, south forty-five degrees and an half east, sixteen perches; thence by land of said Walker, south forty-four de-

grees west, eighteen perches and two-tenths of a perch, to the Baltimore road; thence along said Baltimore road, south forty-eight degrees east, one hundred and eleven perches, to the place of beginning, containing one hundred and sixty acres and sixty perches, nett measure.

Part of said land was conveyed by Edward Shippen and Joseph Shippen to said William Barr by indenture, bearing date the nineteenth day of June, in the year of our Lord one thousand seven hundred and ninety-five, and part thereof was conveyed to William Barr by Edward Bard, by indenture bearing date the fifth day of May, in the year of our Lord one thousand eight hundred and thirteen, together with all and singular the rights, members, and appurtanences whatsoever thereunto belonging or in anywise appertaining, and the reversions and remainders, rents, issues, and profits thereof. To have and to hold the said plantation and tract of land, hereditaments and premises hereby granted or mentioned, or intended so to be, with the appurtenances, unto the said Frederick Boas, his heirs and assigns, to the only proper use, benefit, and behoof of him, the said
70 Frederick Boas, his heirs and assigns forever, and the said William Barr, for himself, his heirs, executors, and administrators, doth hereby covenant, grant, and agree to, with the said Frederick Boas, his heirs and assigns, that he, the said William Barr and his heirs, the aforesaid tract of land, with the appurtenances as above described, against him, the said William Barr, and his heirs, and against all and every other person or persons whomsoever, lawfuly claiming or to claim the same by, from, or under him, them, or any of them, and against all persons whatsoever, lawfully claiming the same, to the said Frederick Boas, his heirs and assigns, shall and will warrant and forever defend by these presents.

In witness whereof, parties to these presents have hereto set their hands and seals the day and year first above written.

WILLIAM BARR. [SEAL.]
MARY BARR. [SEAL.]

Sealed and delivered in presence of us—
JOHN SIMPSON.
JAS. BARD.

Received on the day of the date of the above indenture of the said Frederick Boas, the sum of sixteen thousand and thirty-seven dollars and fifty cents, in full for the consideration money above mentioned.

WILLIAM BARR.

Witness: ———.

CUMBERLAND COUNTY, *viz:*

Be it remembered that on this third day of May, in the year of our Lord one thousand eight hundred and fourteen, before me the subscriber, one of the justices of the peace for said county of Cumberland, personally appeared the above mentioned William Barr and

Mary, his wife, and the said William Barr did then and there acknowledge in due form of law that he had signed and sealed, and as and for his act and deed, delivered the above deed, and desired that the same might be recorded as such. And the said Mary Barr, wife of the said William Barr, being of full age, and by me, separate and apart from her said husband, examined, and the contents of the above deed having been by me made known to her, she, the said Mary Barr, upon such separate examination, declared that she did voluntarily, and of her own free will and accord, sign, and seal, and as her act and deed deliver said deed without any coercion or compulsion of her said husband.

71

In testimony whereof, I have hereto set my hand and seal the same day and year.

JNO. SIMPSON. [SEAL.]

Entered May 4, A. D. 1814. Compared with the original.

CUMBERLAND COUNTY, *ss :*

I certify the foregoing to be a true copy from the record.

In testimony whereof, I have hereunto set my hand and affixed the seal of the recorder's office, at Carlisle, this 22 day of July, A. D. 1865.

E. COMMON. [SEAL.]

[Five cent. rev. stamp.]

EXHIBIT No. 5, (referred to in agreed statement of facts.)

Transcript of probate of the will and allowance of time to settle estate.

The last will and testament of William Barr, dec'd, was presented and same proven by David Wade, Francis Carr, and David McKnight, who were sworn, being subscribing witnesses. Will allowed and court direct letters testamentary, &c., to issue: executors William Barr, James Keys, and John B. Enness, sworn.

Further time granted to ex'ors of William Barr, dec'd, until next term, to settle estate.

THE STATE OF OHIO, *Hamilton county, ss.—Probate court :*

I, Edward Woodruff, sole judge and ex officio cl'k of the probate court within and for the county aforesaid, do hereby certify the foregoing to be a true and correct copy of the order as made by the court of common pleas of Hamilton county, Ohio, on the 22d day of July, anno Domini eighteen hundred and sixteen, in the matter of the last will and testament of William Barr, dec'd, and also the order made by the said court of common pleas on the twenty-second day of December, anno Domini eighteen hundred and eighteen, granting further time to executors of William Barr, dec'd, as the same appears from the records and files of said court.

72

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Cincinnati, this 8th day of April, A. D. 1865.

[SEAL.] EDWARD WOODRUFF,
Probate Judge and ex-officio Cl'k.

[Five cent. rev. stamp.]

EXHIBIT No. 6, (referred to in agreed statement of facts.)

I have been a deputy clerk in the probate court of Hamilton county, Ohio, nearly four years, and am familiar with the administration dockets of said court, and also the administration dockets of the court of common pleas, Hamilton county, Ohio, which are now deposited and kept in the office of this court. I have examined all of said dockets, and cannot find that the executors of the estate of William Barr, dec'd, ever filed an inventory of the property of said estate, or ever filed an account of their receipts and expenditures on account of said estate.

ALBERT PADDOCK,
Dep'y Clerk of Probate Court, Hamilton County, Ohio.

[Five cent. rev. stamp.]

The above is a statement of the clerk of the probate court referred to in agreed statement.

EXHIBIT No. 7, (referred to in agreed statements of facts.)

This is a certificate of the judge of probate court agreed to be received in evidence.

THE STATE OF OHIO, *Hamilton county, ss.—Probate court:*

I, Edw'd Woodruff, sole judge and ex officio clerk of the probate court within and for the county aforesaid, do hereby certify that I have caused the records and files of probate entries of the court of common pleas of Ham. co., now deposited in this office, and also the records of the probate entries of this court, and cannot find that the executors of Wm. Barr, dec'd, ever filed an inventory of
73 the property of said estate, or an account of their receipts and expenditures.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Cincinnati, this 17 day of June, A. D. 1865.

[SEAL.]

EDW'D WOODRUFF,
Probate Judge and ex-officio Clerk,
By ALBERT HADDOCK, *Dep'y Cl'k.*

[Five cent. rev. stamp.]

EXHIBIT No. 8, (referred to in agreed statement of facts.)

Lease of William Barr to Wm. S. Fisher.

Articles of agreement made this 19th day of Nov., 1824, between William Barr, of the city of Cincinnati and State of Ohio, and Wm. S. Fisher, of the same state, witnesseth: William Barr rents unto said Wm. S. Fisher the farm on which Abijah Maddox now lives, and adjoining lands of William Terry on the west, Dickinson on the east, for the term of one year from the first of April next, or if possession can be had on the first of March next, then the term to be one year

from the first of March next; for the occupation of said farm Wm. S. Fisher binds himself and his heirs to pay Wm. Barr or his heirs two hundred dollars, in payments as follows, viz: seventy-five dollars in six months from the first of March or April next, at whichever of the terms possession may be given; the other fifty dollars to be expended on the farm at such time within the year as may be deemed most for the benefit of said farm by the before-named Wm. Barr. The taxes are also to be paid by Wm. S. Fisher; he is to farm the place in a good and farmerlike manner, to cut no wood for firewood except fallen or decayed timber, or the tops of such trees as may be found necessary to make rails for repairing fences; the grass-seed sown is to be paid for by Wm. Barr, and Fisher is to have the privilege of leaving on the place fifteen acres of wheat when he leaves it,
which wheat he is also to have the privilege of threshing on
74 said place.

Witness our hands and seals the date before written.

WM. S. FISHER. [SEAL.]
W. BARR. [SEAL.]

Witness presence:
JOHN T. ROBINSON.

CINCINNATI, *August*, 1826.

The term of the before-written lease having expired on the first day of March last, Wm. Barr rents Wm. S. Fisher the same farm for the term of one year from 1st day of March last, and on the same terms as last year, only with this alteration, viz: The rent for this present year to be one hundred and twenty per year in cash, and fifty dollars in such repairs as Wm. Barr may direct on said farm deducting .

EXHIBIT NO. 8.

Lease of John Bigelow and Maria, his wife, to Wm. S. Fisher.

This agreement made this eighth day of March, 1827, between John Bigelow and his wife Maria, of the one part, and John Salyer and Aaron G. Peterson of the other part, showeth: That the said Bigelow and wife hath this day leased to the said Salyer and Peterson the farm lately occupied by Wm. S. Fisher, and on which the said Salyer now lives, for the ensuing year, viz: from the date hereof to the 1st of March, 1828, for the sum of 180 dollars, one-half to be paid in the month of September next, and the other half to be paid on the first day of March, 1828. The said Salyer and Peterson are to be careful to keep the house, barn, and farm in good repair, and not cut any timber except for the use of the farm, any clearing of the land, making new fences, or removing old, and all repairs of importance, as also the quantity of ground which they may seed down in fall or winter grains, will depend on future agreement. And at the expiration of the term aforesaid the said Salyer and Peterson are to deliver up the said farm to the said Bigelow and wife,

or to their order, in as good repair as the nature of the case will admit of.

In witness whereof, the parties have hereunto set their hand and seal the day and date above mentioned.

J. BIGELOW. [SEAL.]
M. BIGELOW. [SEAL.]
his
JOHN ⋈ SALYER. [SEAL.]
mark.
AARON PETERSON. [SEAL.]

Witness: ———.

I hereby bind myself as security for the performance of the above ease as far as respects the said Salyer and Peterson.

——— ———. [SEAL.]

EXHIBIT No. 8.

Lease of John Bigelow and Maria, his wife, to Wm. S. Fisher.

This agreement, made the 27 day of July, 1826, between John Bigelow and his wife Maria, of the one part, and Wm. S. Fisher, of the other part, showeth that the said Bigelow and wife hath this day leased to the said Fisher the farm on which the said Fisher now lives, for the term of one year, commencing on the first day of April last, for the sum of one hundred and seventy dollars, fifty of which to be paid repairs on said place, conformable to an agreement made between said Fisher and Wm. Barr, and the balance of one hundred and twenty dollars, the said Fisher to pay to said Bigelow one-half on the first of October next, and the balance on the first of April, 1827. It is also agreed that the said Fisher may put down in the fall crop the large orchard west of the house, and the large field north of the house, the orchard to be seeded with clover. The said Fisher, at the expiration of the term above mentioned, is to deliver up the said farm to the said Bigelow and wife, or their order, all in good order as the case will admit of.

In witness whereof, the parties hereunto have set their hands and seals the day and date above written.

J. BIGELOW. [SEAL.]
M. BIGELOW. [SEAL.]
WILLAM S. FISHER. [SEAL.]

Witness: CHARLES RHOADS.

I hereby sign the occupancy of within or above lease from this date to the first day of April next to John Salyer and Aaron G. Peterson, for value received.

March 6th, 1827.

WILLIAM S. FISHER.

THE STATE OF OHIO, *Hamilton county, ss:—Ham. com. pleas.*

76 I, Benjamin J. Horton, clerk of the court of *the court of* common pleas, within and for the county of Hamilton aforesaid, do hereby certify the above and foregoing to be full and correct copies of certain articles of agreement or leases filed in said court in the case of John Salyer and Aaron G. Peterson, pl'ffs in certiorari, *vs.* Wm. Barr, No. 264, as the same appears from the files of said court in my office remaining.

Witness my hand and seal of said court, at Cincinnati, this 5th day of September, A. D. 1865.

[SEAL.]

B. J. HORTON,
Cl'k Court Common Pleas, Ham. Co., Ohio.

[Five-cent rev. stamp.]

77 Know all men by these presents that we, Richard W. Keys, o: Cincinnati, Ham. co., O., and Josiah L. Hickman, of Cincinnati, Ham. co., O., are held and firmly bound unto Ephraim Morgan, Patrick Cousidine, John B. Purcell, E. Henry Carter, John Young and Caroline Young, his wife, Joseph B. Hubbard and A. Rebecca A. Hubbard, his wife, Boyle, widow, and Jesse Peyton Boyle, Elizabeth Boyle, Stephen Boyle, Edward Boyle, Anna Boyle, Margaret Boyle, and Alfred Boyle, minor children of Stephen S. Boyle, deceased, and their heirs, administrators, and executors, in the penal sum of one thousand dollars, to the payment of which well and truly to be made we do hereby bind ourselves and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, signed, and dated this 23d day of Dec., A. D. 1865.

The condition of this obligation is such, that whereas heretofore, to wit, on the 15th day of Dec., A. D. 1863, John Doe, Ed. Dem, John A. Poor and Margaret R. Poor, his wife, brought a suit in ejectment against Richard Roe, and said parties second above named were made defendants in place of said Richard Roe, and said cause proceeded to trial; and whereas, at the trial *at the trial* of said cause,

78 the court gave certain instructions to the jury as to the law arising upon the facts of the case, to which the said plaintiff, by his counsel, at the time excepted, and his bill of exceptions was signed and sealed by the court; and whereas a writ of error in the premises has been allowed by the Supreme Court of the United States:

Now therefore, if the said plaintiff shall prosecute his writ to effect in the said the Supreme Court of the United States, with all practicable speed, and shall answer all damages and costs if he fail to make his plea good, then these presents shall be void; otherwise, to remain in full force, virtue, and effect.

Executed the day and year first aforesaid.

RICH'D W. KEYES. [SEAL.]
J. L. HICKMAN. [SEAL.]

Witnesses: How. W. BLIEW.

The above bond is approved.

H. H. LEAVITT, *Judge.*

UNITED STATES OF AMERICA, *Southern district of Ohio, ss:*

I, John McLean, clerk of the circuit court of the United States for said district, certify the foregoing to be truly taken and copied from the original bond on file in this office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court 23d day of December, A. D. 1865, and in the 90th year of the independence of the United States of America.

Attest:

JOHN McLEAN, *Clerk.* [SEAL.]

79 UNITED STATES OF AMERICA, *Southern district of Ohio, ss:*

I, John McLean, clerk of the circuit court of the United States within and for the seventh circuit and southern district of Ohio, do hereby certify that the foregoing record is made up of all the pleadings, motions, entries, and orders, and the bill of exceptions filed and entered in said cause, and that the same are correctly copied from the originals as the same are now preserved in my office.

Witness my hand and the seal of the said court this 19th day of December, A. D. 1865, and 90th of American independence.

Attest: JOHN M. LEAN, *Clk Cir. Ct U. S.*

Clerk's fees for transcript, $25.

80 *Assignment of errors.*

In the Supreme Court of the United States.

JOHN DOE, *ex dem.* JOHN A. POOR and MARGARET R. POOR, his wife, plaintiffs,
vs.
PATRICK CONSIDINE, EPHRAIM MORGAN, JOHN Young and Caroline Young, his wife, E. Henry Carter, Joseph B. Hubbard and Rebecca A. Hubbard, his wife, John B. Purcell, Boyle, widow, Jesse Payton Boyle, Elizabeth Boyle, Stephen Boyle, Edward Boyle, And. Boyle, Margaret Boyle, and Alfred Boyle, minor children of Stephen S. Boyle, deceased, defendants. } In error.

And the said John Doe, *ex dem.*, John A. Poor and Margaret R. Poor, his wife, now comes and says that in the record and proceedings aforesaid there is manifest error, to his injury and prejudice, in this, to wit:

I. The court erred in instructing the jury that at the death of the said Mary Jane Barr, the granddaughter of the testator and daughter of John M. Barr, she was seized of a vested remainder in the premises in controversy.

II. The court erred in instructing the jury that at the death of said Mary Jane Barr her estate in said premises descended to the brothers and sisters of the said testator then alive, and the legal representatives of such of them as were then deceased.

III. The court erred in instructing the jury that the trust estate to the sons-in law was only an estate per autre vie, and terminated at the death of Maria Bigelow; but whether that trust estate continued or not after her death, that the result is the same, for if the
81 estate so vested in Mary Jane Barr were only an equitable estate no recovery could be had against the parties in possession, under the title in favor of the trustees or their heirs.

IV. The court erred in instructing the jury that in no event, except the death of John M. Barr without issue, did the will give to the sons-in-law any interest in the property in controversy other than the temporary trust estate.

Wherefore the plaintiff prays that the said judgment be reversed and annulled, and held for nothing, and that he may be restored to all things that he has lost by reason thereof.

T. EWING,
H. H. HUNTER,
JNO. W. ANDREWS,
Attorneys for Plaintiffs.

82 THE UNITED STATES OF AMERICA:

Supreme Court of the United States.

To Patrick Considine, Ephraim Morgan, John B. Purcell, E. Henry Carter, John Young and Caroline, his wife, Joseph B. Hubbard and Rebecca A. Hubbard, his wife, Boyle, widow, and Jesse Payton Boyle, Elizabeth Boyle, Stephen Boyle, Edward Boyle, Anna Boyle, Margaret Boyle, and Alfred Boyle, minor children of Stephen S. Boyle, deceased, greeting:

Whereas John Doe, on the demise of John A. Poor and Margaret R. Poor, his wife, obtained the allowance of our writ of error to the honorable the judges of the circuit court of the United States for the southern district of Ohio, directed to remove into the said Supreme Court, holden at the city of Washington on the first Monday in the month of December, A. D. 1865, the record of a certain plaint, process, proceedings, and judgment in an action of ejectment, wherein you, the said Patrick Considine, Ephraim Morgan, John B. Purcell, E. Henry Carter, John Young and Caroline, his wife, Joseph B. Hubbard and Rebecca A. Hubbard, his wife, Boyle, widow, and Jesse Payton Boyle, Elizabeth Boyle, Stephen Boyle, Edward Boyle, Anna Boyle and Alfred Boyle, minor children of Stephen S. Boyle, deceased, are defendants, and the said John Doe on the demise of said John A. Poor and Margaret R. Poor, his wife, is plaintiff, and in which said action judgment was lately, to wit, at the October term of said circuit court, A. D. 1865, given and rendered, as by the record thereof in said court remaining appears, in which said record and proceedings, and also in the rendition of the judgment thereupon, manifest error hath intervened, as by the said John Doe we are informed, and our said writ of error is granted, issued, and allowed as aforesaid, for the purpose of correcting the errors aforesaid alleged, if any there be:

You are, therefore, hereby commanded and cited to be and appear before the judges of the said Supreme Court, at the city of Washington, at the term of said court holden on the first Monday in the month of December, A. D. 1865, to have the errors aforesaid corrected and the judgment of our said Supreme Court thereupon.

Witness the honorable Salmon P. Chase, Chief Justice of the United States of America, this 19th day of December, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the United States of America the 90th.

[SEAL.] H. H. LEAVITT,
Dis't Judge U. S. for said Dis't, and one of the Judges of said Court.

83 Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the southern district of Ohio, greeting:

Because in the record and proceedings, and also in the rendition of a judgment, in a plea which is in the said circuit court before you, wherein John Doe, on the demise of John A. Poor and Margaret R. Poor, his wife, is plaintiff, and Patrick Considine, Ephraim Morgan, John B. Purcell, E. Henry Carter, John Young and Caroline Young, his wife, Joseph B. Hubbard and Rebecca A. Hubbard, his wife, Boyle, widow, and Jesse Payton Boyle, Elizabeth Boyle, Stephen Boyle, Edward Boyle, Anna Boyle, Margaret Boyle, and Alfred Boyle, minor children of Stephen S. Boyle, deceased, are defendants, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears; and it being fit that the error should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington within thirty days after the first Monday in the month of December instant in the said Supreme Court, then and there to be held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United State should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this nineteenth day of December, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the United States of America the 90th.

Attest:

[SEAL.] JOHN McLEAN, *Clerk.*

84 Service acknowledged as to defendants John B. Purcell and Boyle, widow, and Edward Purcell, guardian ad litem of Jesse Payton Boyle, Edward Boyle, Elizabeth Boyle, Margaret Boyle, Stephen Boyle, Anna Boyle, and Alfred Boyle, infants.

T. D. LINCOLN,
Of Counsel for Def'ts.

Service acknowledged as to defendants Ephraim Morgan, E. Henry Carter, John Young and Caroline Young, his wife, Joseph B. Hubbard and Rebecca A. Hubbard, his wife, and Patrick Considine.

G. E. PUGH, *Att'y for said Def'ts.*

No. 87

Supreme Court of the United States.

DOE ON THE DEMISE OF JOHN A POOR,
AND MARGARET, HIS WIFE,
PLAINTIFFS IN ERROR,

vs.

PATRICK CONSIDINE, EPHRAIM
MORGAN, ET AL.,
DEFENDANTS.

Argument of Thomas Ewing for Plaintiffs in Error.

Supreme Court of the United States.

DOE ON THE DEMISE OF JOHN A POOR, AND MARGARET, HIS WIFE,
PLAINTIFFS IN ERROR,

vs.

PATRICK CONSIDINE, EPHRAIM MORGAN, ET AL.,
DEFENDANTS.

Argument of Thomas Ewing for Plaintiffs in Error.

I need not preface my argument in reply with a full statement of the case, but merely such conclusions as the Court will necessarily arrive at, without discussion, as to the points of fact and law out of which the contested questions in the case arise. They are, in substance, these:

The propositus, William Barr, devised the estate in controversy in fee to his three sons-in-law, William Barr, James Keys, and John B. Enness, IN TRUST, to hold the same—

1st. For the use of John M. Barr for life.

2d. Remainder for the use of Maria Barr for life, charged with the maintenance and education of the child or children of John M. Barr.

3d. "*On the decease of Maria Barr,*" remainder to the legitimate child or children of the said John M. Barr, and their heirs, forever.

This is the first and only devise to the children of John M. Barr.

4th. If John M. Barr die without leaving issue of his

body, remainder over to the three sons-in-law, Barr, Keys, and Enness, in fee, discharged of the trust.

5th. After specific legacies, he devises and bequeathes the remainder of his estate, both real and personal, to his sons-in-law, Barr, Keys, and Enness.

Mary Jane, daughter of John M. Barr, was living at the date of the will and at the death of the testator.

John M. Barr died, leaving Mary Jane, his only child. The child died in 1821. The mother, Maria Barr, died in 1860.

The brothers of devisor aliened to defendants, or those under whom they claim.

The plaintiffs claim title under the sons-in-law and daughters of Wm. Barr, Sr., the devisor.

There is a question arising as to the construction of the statute under which this devise was made and took effect, which I will discuss in its proper order; for the present conceding it to be as contended by defendants' counsel. I proceed now to consider the effect of the devise under that act, so construed; and here the first quesion is—

I.

Did the remainder devised to the child or children of John M. Barr, "*upon the decease of Maria Barr,*" vest in Mary Jane and her heirs forty years before it was expressed to be devised to her?

I think it very clear that, according to the ordinary use of the English language, whether by common men or by philosophers, poets, or metaphysicians, anybody and everybody, except lawyers, who are required to discuss the question and interpret it by *rule*, it will be held at once that a gift "*upon*" a day is not a gift forty years before the day; or that a gift "*upon*" the happening of an event is not a gift before the event happens.

The latitude of construction is large in case of a devise, and its rules are adapted to aid in carrying out the intent of

the devisor, making the whole instrument convey his true meaning, in spite of inappropriate words or terms. Therefore, the same words are often construed in a devise differently from their construction in a deed or will; as in Boralson's case, 3 Rep., 19 *b.:*

"And it was said if Thomas Boralfson in this case had made a lease till Hugh obtained his full age—Hugh then being nine years of age—the lessee should not have an absolute lease for twelve years; for, if Hugh should die before his full age, the lease would be ended—*quod fuit concessum per totam curiam.*" "But it was said, in this case," (a devise,) "although Hugh died before his full age, yet the interest and term of the executors did not cease, and the reason was because the intent of the devisor is to be considered; and, when he deviseth his lands to his executors, until Hugh, his son, shall come of full age for payment of his debts, and to perform his will, it is to be intended he hath computed that the profits to be taken of his lands by his executors during the minority of his son (which was for the space of twelve years) would suffice to pay his debts and to perform his will, and that he did not *intend* it should determine by the death of his son." "And, therefore, the case of a devise doth differ from a lease or a grant made in like manner; for the devisor is intended to be *inops consilii; and, therefore, the law will be his counsel, and, according to his intent appearing in his will, will supply the defect of his words.*"—20 *b.*

This consideration of the want of knowledge in testator of the legal effect of words and phrases, and the duty of Courts so to construe and modify, and, if necessary, change the inapt words which they use so as to meet *the intent,* is a paramount rule, often announced, never disputed, and it applies to every case, and runs through every case from beginning to end. It does not stop half way in a case, and on finding part of the intent of the testator effected, leave the main part to be defeated by construing an inapt term, or

misconstruing an apt term, so as to end in defeating such intent. We claim a construction in this case such as will satisfy the obvious intent of the testator in his whole devise—not defeat or prevent any part of it—and as the "law will be testator's counsel, and according to his intent, appearing in his will, will supply the defect of his words," we submit that we have a right to claim it.

It will simplify the investigation somewhat to notice the fact, which I think is not disputed, that children and heirs, and *issue* in this devise, all mean the same thing; and that *issue* is the only term which will represent the will of the testator in every situation is equally clear, as in the trust to support and educate the *children* of John M. Barr charged on Maria Barr's life estate. Grand children were doubtless also intended, and *issue* in its strict sense would embrace them.

The only clause containing a devise to the *issue* of John M. Barr is this: "And upon the decease of said Maria Barr," (if she survive—and she did survive,) "I do further give and devise the remainder of my estate in said farm to the legitimate child or children of said John M Barr, and their heirs forever. If my said son have but one child as aforesaid, then" (upon the decease of said Maria Barr) "I give and devise my said farm to him or her, or to his or her heirs forever. But if he leave two or more children, then" (upon the decease of said Maria Barr) "I give and devise the said farm to such children and their heirs, to be equally divided between them."

He devises "*upon the decease of Maria Barr.*" The further clause above copied, merely provides, as I have interpolated, for the contingency of one or more devisees. The first estate in fee, except the trust estate in the sons-in-law, is, upon the decease of Maria Barr, to the legitimate child or children "*issue*" of John M. Barr. If the law creates a previous estate in the child of John M. Barr, it does it, not in

accordance with the will of testator, but against it—in spite and in utter disregard of his will. The devise of the last remainder to the three sons-in-law is worthy of consideration. It is in these words:

"But should my said son, John W. Barr, die without leaving any issue of his body, then and in that case I do give and devise the remainder of my estate in the said farm to my said sons-in-law, William Barr, James Keys, and John B. Enness, and their heirs forever."

Now, when is this failure of issue to take place? Is it at the instant of the death of John W. Barr? Is it an indefinite failure of issue? Or is it a failure of issue at the falling in of the last life estate? The last would best conform to legal rules, and also much the best to the general intent of testator. This we claim should be adopted, as there can be no rational object in fixing it at any other time or the happening of any other event, and the Court habitually mould adverbs of time, and phrases implying time, to meet the intent of testators and subserve the ends of justice. The learned counsel on the other side furnish abundant cases to this point. Those cases are not always applied as they ought to be to sustain, but, sometimes, to defeat, an obvious
Hitchcock, in the case of Benedict *vs.* B
satisfied himself of the intention of a test
an array of artificial rules, says: "Now, is this intention to be defeated by any *rule* of construction heretofore adopted? And here I must be permitted to say, that those *rules*, in most cases, are applied not for the purpose of ascertaining, but of defeating the intentions of a devisor or a testator." That they are often *so construed*, is undoubtedly true; but the *rules*, as they are called, are for the most part very properly applied in the cases in which they have their origin to carry out the intent of testator or devisor. For example: Adverbs of time *generally* relate to the taking effect in *possession*, not in *estate*, in case of a devise in remainder, so as to

misconstruing an apt term, so as to end in defeating such intent. We claim a construction in this case such as will satisfy the obvious intent of the testator in his whole devise—not defeat or prevent any part of it—and as the "law will be testator's counsel, and according to his intent, appearing in his will, will supply the defect of his words," we submit that we have a right to claim it.

It will simplify the investigation somewhat to notice the fact, which I think is not disputed, that children and heirs, and *issue* in this devise, all mean the same thing; and that *issue* is the only term which will represent the will of the testator in every situation is equally clear, as in the trust to support and educate the *children* of John M. Barr charged on Maria Barr's life estate. Grand children were doubtless also intended, and *issue* in its strict sense would embrace them.

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accordance with the will of testator, but against it—in spite and in utter disregard of his will. The devise of the last remainder to the three sons-in-law is worthy of consideration. It is in these words:

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make it vested rather than contingent. But it were sticking in the bark—or worse a gross misapplication—to hold that it is a rule to be adopted where it defeats the intent. The *rule* is to construe every word and sentence of a devise, so as to carry out, as far as possible, the intent of the testator, and if, giving the adverb of time, or the equivalent adverbial phrase, such construction as to apply it to the *vesting of the estate* instead of its *coming into possession* merely, will best carry out the intent of the devisor, the *rule* is so to construe it. This adverbial rule is merely ancillary to the great rule of carrying out the intent, and where it does not aid and support *that*, it is not to be regarded. The words and phrases must be understood in their popularly accepted meaning wherever that meaning will best carry out the intent. It would be a monstrous perversion to accept and sustain a rule, no matter by whom devised, or by whom or how many adopted, the obvious effect of which would be to defeat the intention of the devisor. It would be suffering, not the devisor, nor the Courts which hear the case, to make and regulate and construe the devise, but strangers—foreign writers and foreign tribunals to do it for him and them. The rule, as it is called, that holds a remainder *vested* even by forcing the language, has its origin in a purpose to *save*, not to *defeat*, the intent of the grantor or devisor by saving the remainder from many of the accidents which destroy it if contingent. Cruse Dig., Tit. 16, Chap. 6, passim, Ch. 7, Sec. 1. Yet, even in these cases, the early vesting of a remainder is not an *end*, but a *means;* and if it do not tend to carry out and effect the true *end*—the transfer of the estate in accordance with the will of the devisor—it is not to be respected as a rule. If it tend to defeat the paramount *end*—that *end* for the effecting of which all rules were adopted—it must be rejected as an error and a mischief.

This case is subject to none of the casualties attending remote remainders against which early vesting was intended to

guard; it would not be subject to them in England, being protected against them by the attendant trust estate in the sons-in-law; but destroy the effect of the phrase "*upon the decease of Maria Barr*," and make the estate *vest* in the issue of John Barr one life, or two lives sooner than the devisor intended, you defeat the general intent of the devisor—the paper so construed is not his will; but against his will, and the moment the clause so construed takes effect in possession on the determination of the second remainder, it passes the estate out of the issue of the devisor and out of his devisees, and vests it in collaterals. In the case of Olney *vs.* Hull, 1 Beck, 1 Peck, 314, this absurd and fictitious rule, *that adverbs or phrases of time are to be disregarded* or applied in a sense different from that in which they are used by the devisor, is ignored, and the Court treat the language used precisely as it would be treated in the every-day business of life. They allow the devisor the important privilege of expressing his purpose correctly in the English language, and what is more important to him, they understood his very plain language without resorting to cases and Digests to find out what somebody else said or meant, but which he did not say, and did not mean; and which, when found and adopted and applied to his devise, would have defeated the estate which he intended to create. In that case the devise is: His lands to his wife while she remain his widow; but, in case of her death or marriage, the land *then* to be divided among his surviving sons. It was held that the devise over was to such of his sons as should be survivors at the termination of the wife's estate for life, and the remainder was contingent upon the uncertainty which of the sons should then be living. "Until the death of the mother it was uncertain which of the sons would be alive to take." The remainder there fore was contingent. Here the adverse of time, "*then*" has its appropriate meaning—it performs its office and refers to and fixes the time at which the event under consideration takes place.

The phrase fixing the time when the remainder, in fee, shall come into existence, is, in our case, if possible, more determinate than in that of Olney vs. Hull. "*Upon the decease* of the said Maria Barr," "I do further give and devise the remainder of my estate in said farm unto the legitimate child or children of the said John M. Barr and their heirs forever."

The time of the remainder vesting could not be more distinctly and definitely fixed. The devisor does not say that the *issue* of John M. Barr shall come *into possession* on the decease of Maria Barr, but he says, "*upon the decease* of Maria Barr, *I give and devise the remainder.*" According to a fair and unperverted construction of language the estate commences at the time of the happening of the event named in the devise—that is, "*upon the decase.*" We use this term habitually in this sense. "A inherited upon the decease of his father." And must the plain and correct English of a plain man be refused its true meaning because it is written in his will? He uses a phrase as exact and definite in its meaning as any in the language, and I now, after study, would be at a loss to find a better to effect his distinct object. He could not suspect a latent necessity of accumulating epithets to enforce a meaning once distinctly conveyed in plain, intelligible language. And the reasons which influenced courts to hold remainders vested if the language of the will would permit it, even by a forced construction, is wanting here. The *trust estate* attending this devise, protects, without the aid of such rule, the last remainder from the danger of forfeiture, fine, and recovery, destroying one of the intermediate estates, and with it, the remainder which rests upon it.

But Mr. Stanbery insists that the *intent* of the devisor will be best carried out by making the remainder to the children of John M. Barr vest at once, so that the estate will pass to their heirs, inasmuch as they are the first ob-

jects of the testator's bounty, and he intended the estate for them. Certainly, he intended it for them, *if living*, and our construction takes nothing from the devise to the living issue of John M. Barr. So long as any of these were in being, we agree with him; but, when all were dead—a state of things contemplated and provided for by him—who were the next objects of his bounty, his own descendants or collateral relatives? The devise over to the sons-in-law answers the question. Mr. Stanbery treats this state of things as a remote possibility, not within the contemplation and intent of the devisor, and that, therefore, the law should not look to his intent on such contingency. The learned counsel forgets the language of the devise; the devisor contemplated the very contingency and provided for it fully, if the rules of construction will allow him to be understood, when he declares his purpose in direct and unequivocal language.

This devise comes within the reason of the case of Olney vs. ~~Payne~~ Hull in all things. The devise was expressed to be made *upon the decease* of Maria Barr—it was of the *remainder* of the estate after her decease. The devisor, therefore, understood he had a remainder to give. It was to the *living*, not to the *deceased*, child or children of John M. Barr; and, as in the case cited, it was uncertain who of the issue of John M. Barr would be living at the death of Maria Barr, the remainder, therefore, was contingent upon such survivorship.

If all these conclusions are not absolutely conclusive in the opinion of the Court, they are so obviously within the general intent of the testator that the Court will receive them as if they were distinctly expressed. If indistinct and uncertain, which I submit they are not, the Court will "*intend*" the devisor to be "*inops consilii*," and make the "*law*" to "be his counsel, and, according to his intent appearing in his will, will supply the defect of his words."—3 *Rep.*, 20 (*b.*)

II.

But, if we are wrong on this point, then, assuming that Mary Jane Barr had, at the time of her death, a vested estate in the premises, descendible through her under the devise from her ancestor, William Barr, I will now enquire, to whom does that estate pass under the Ohio Statute of descents of December 30, 1815?

Whenever a statute requires construction, as where one clause seems to contradict another, or to modify or be modified by another, the first duty of a Court, in construing it, is to ascertain the general intent of the Legislature in passing it, and to give it such construction as will make the act a consistent whole, and, as far as the language will permit, carry into effect that intent.

In the five last sections of the act which relate to the simple case of an estate acquired *by purchase* the opinion of the Legislature as to the proper course of descents is distinctly shown. The children of the intestate and their legal representatives first inherit. The same purpose runs through the whole act. It was the clear intent of the Legislature to place the children of the ancestor the first to inherit in all cases where the estate passed under the law of descents, no matter by what means or through what complications it chanced to fall within the purview of the act. There is a further purpose equally clear: That, where there are no children of the intestate or their legal representatives, the estate shall pass to his next of kin, and the third, fourth, and fifth sections points out who shall be held as such in their orders, until it ascends to the father or mother; then, by the sixth section, it is to pass in general, to the next of kin of the blood of the intestate.

The first section of the act, which applies most especially to the case at bar, pursues the same order in the first, second, and third clauses, until it restores the estate to the ancestor from whom it came by deed of *gift*—save only that it passes

by and excludes the brothers and sisters of the intestate of the half-blood, not of the blood of the ancestor from whom the estate came. The fourth clause contains the disturbing element, by reason of which the statute requires construction: its second branch provides, that under prescribed conditions—for want of brothers and sisters of the ancestor from whom the estate came—the brothers and sisters of the intestate of the half-blood, not of the blood of the ancestor shall inherit. The fifth clause, if it be allowed its full effect, if its obvious intent be not controlled by construction, makes the act consistent and rational, and, according to the intent of the Legislature, as gathered from the whole act, except in one possible contingency, as, where there are half-brothers or sisters not of the blood of the ancestor, which contingency does not occur in this case. This clause provides—

"That if there be no brothers or sisters of the intestate or their legal representatives, the estate shall pass to the next of kin of the intestate of the blood of the ancestor from whom the estate came."

This is the case at bar. There were no brothers or sisters of the intestate or their legal representatives. The estate, therefore, passed to her next of kin of the blood of the ancestors from whom the estate came—to the daughters, not to the brothers of the ancestor—to his lineal descendants, not to his lateral kin—to the nearest, not to the more remote relations of the intestate. Such is the clear meaning of this final clause of the section, unless its plain language can be got rid of by construction. But, in my opinion, a critical examination of the several provisions of the act will but confirm the obvious construction of the clause last cited.

If the fifth clause conflicted with the fourth, so that but one could stand, the fifth, being the *last* expression of the sovereign will, must prevail over the *first*, as it is a well-settled rule that, where the actor possesses absolute and enduring

power over the subject, his last expression is binding, as in the case of a statute or a will, where the last statute or last will abrogates all prior; but not in a deed where the grantor parts with the power in the act. It is with prior and subsequent *clauses* in a statute or will or deed, as in each of the several *acts*. A statute, will, or deed, where one is prior and another subsequent, the last statute and the last will, not the last deed, prevails. And, although all parts of a statute are simultaneous, yet it occupies time in its preparation, and that which is written down last is often framed to explain or modify prior clauses, so as to make them consistent with the general intent, and with each other. A law has been written, and the legislator is not satisfied that it does, under all circumstances, speak his intent, and he inserts another clause to make the sense more clear, or to control it if it be wrong. Such provision, though it do not take the form of a proviso, should have the same effect. But this rule of construction is sometimes overborne by another still more cogent, namely, in case of conflict, that provision must prevail which most conforms to the general spirit and intent of the act. In this case the two rules coincide—the construction which we claim conforms strictly to the general intent of the act; the contrary construction subverts it. There were daughters of the ancestor from whom the estate came, living at the death of intestate. There were brothers of the ancestor living. The plain, direct, and indisputable construction of the act, if we take the last expression of the Legislature as their will, gives the inheritance to the daughters of the ancestor, instead of his brothers, and to the aunts of the intestate, instead of collaterals two degrees further removed. Therefore, if the fourth and fifth clauses of the act were inconsistent with each other, the fifth clause being the last expression of the legislative will, and being in strict conformity to the general spirit and intent of the act, ought to prevail. The lineal descendants of the ancestor ought to

inherit from or through him in preference to his collateral kindred, and the near relatives of the intestate through her, in preference to the remote.

Properly construed, I think there is no conflict between the fourth and fifth clauses of this section, so far as they apply to this case. In a possible state of case there might be a verbal contradiction. The fourth clause of the first section directs the course of descent where there are no brothers or sisters of the intestate of the blood of the ancestor from whom the estate came; but where there are half-brothers and sisters not of his blood. The intent and effect of this clause is to make heritable, under certain conditions, half-brothers and sisters of the intestate, not of the blood of the ancestor, and it can have no other reasonable purpose. Then the half-brothers and sisters could not inherit under the general provisions in the fifth clause "the next kin of the intestate of the blood of the ancestor from whom the estate came." but the brothers and sisters of the ancestor could inherit under it in the appropriate order, according to their degree of kindred to the ancestor and to the intestate. They are not as near to the ancestor as his sons and daughters, or to the intestate as her uncles and aunts; and therefore could not inherit until after them, according to the plain general intent of the act. Therefore, the fourth clause could not be omitted, and the fifth stand alone without excluding absolutely from the inheritance brothers and sisters of the half-blood of the intestate, not of the blood of the ancestor, for they are not embraced in any class of persons made heritable; while every possible relation of the intestate of the blood of the ancestor is provided for by that clause in the order in which according to the general intent of the act, and the settled opinion of mankind they ought to be provided for; and among the rest the brothers and sisters of the ancestor according to their degree of proximity to the intestate and to the ancestor. It cannot for a moment be supposed that the fourh clause

was intended to change the position of the brothers and sisters of the ancestor in the line of descent, and give them a preference over his sons and daughters. When the descent is thus cast back to the ancestor, and through him, the same governing reasons apply as in the original transmission of title, and the first clause of the section explains and construes the fourth and fifth. When the title passes first from the ancestor, it goes to his sons and daughters. When it has been once disposed of, and returns to him again, as in this case, it must take the same course; it must go as it would have originally gone, provided the law can be reasonably construed so as to permit it. The children of the ancestor are first in the order of inheritance when the estate first passes out of him, and there can be no reason why, when it returns to and passes from him again, it should pass them by and go to his brothers and sisters. And mark the further strange inconsistency of the statute, if thus construed. In case of a deed of gift where the ancestor is living at the time of donee's decease, so that the estate having once passed out of him ascends to him again, it will descend through and from him, to his *children*, not to his *collateral relatives* first as it would have descended, had it never passed from and returned to him. It were attributing mere caprice to the legislature to suppose they intended that the course of descents should be changed, and that his collateral relatives instead of his lineal descendants should inherit, because it chanced that he was deceased when the estate reverted and passed through him, and he became again in effect the ~~proprietor~~ Intestate. In this case there was an estate for life in the father, John M. Barr; remainder to the mother for her life; remainder to the daughter in fee. Had the estate been devised directly to the daughter, under the construction contended for by our opponents, the father of intestate, if living, would not have inherited, though he was also the son of the ancestor from whom the estate came: but the

inheritance would have gone to the intestate's great uncles and aunts, or their descendants, her cousins in the fourth or fifth degree; in other words, to strangers as to her, and to remote collaterals of the ancestor from whom the estate came.

Such were the effect of the construction contended for. It makes the statute inconsistent with itself, and against the common sense and feelings of men; and it should not be so held, unless its language imperatively require it.

So far from this is the fact, that a fair construction of the language of the section does not admit it. I now proceed to analyze it:

The section is divided into five paragraphs, each of which provides for a class or classes of heirs. In each succeeding paragraph which provides for another class, there is saved in express terms all that were intended to be saved of those named in the next prior clause, whether it be one or more.

1st. The first clause gives the estate to the children of the intestate, &c.

2d. *If there be no children, &c.*, to the brothers and sisters of the intestate of the blood of the ancestor, &c.

3d. *If there be no borthers or sisters of the blood, &c.*, and if the estate came by deed of gift from an ancestor who may be living, the estate shall ascend to such ancestor—two possible heritors in this clause.

4th. *If there be no brothers or sisters, &c., of the blood of the ancestor, and if the ancestor be deceased,* (both possible heritors in the 3d clause saved,) the estate shall pass to the brothers and sisters of such ancestor; and if there be no brothers and sisters of the ancestor, then to the brothers and sisters of the intestate, though such brothers and sisters be not of the blood of the ancestor. (Two possible heritors in this clause, but one of which is saved in the next.)

5th. *If there be no brothers or sisters of the intestate,* &c., "the estate shall pass to the next of kin to the intestate of

the blood of the ancestor"—not as in the other cases *saving the brothers and sisters of the ancestor,* but saving only the brothers and sisters of the intestate. If it had been intended to save the brothers and sisters of the ancestor from the operation of the 5th clause, it would have been done expressly as brothers and sisters of the intestate. When placed in a new connexion in the 4th clause, they are again expressly saved after having been already saved in the 3d clause, as :

"3d. If there be no brothers and sisters of the intestate "of the blood of the ancestor from whom the estate came or "their representatives, and if the estate came by deed of "gift from an ancestor who may be living, the estate shall "ascend to such ancestor." Then the 4th paragraph saves both classes of heirs named in the 3d, to wit : "If there be "neither brother nor sister of the intestate of the blood of the "ancestor from whom the estate came," "and if the ances-"tor from whom the estate came be deceased, the estate shall pass," &c—that is, all that are named as heritable in the 3d clause are expressly saved in the 4th. The 4th clause then makes the brothers and sisters of the ancestor next heritable, and for want of them the brothers and sisters of the intestate of the half-blood, not of the blood of the ancestor from whom he estate came. Then, in the 5th clause, the half-brothers and sisters of the intestate are, in the general expression, "*if there be no brothers or sisters of the intestate,*" not of the blood, expressly saved, but the brothers and sisters of the ancestor are not saved in this clause, but remitted to their appropriate place with the next of kin of the blood of the ancestor. If, in the last clause, after the word "fifth," we insert the words *but provided that,* so that the clause will read—*but provided that* "if "there be no brothers or sisters of the intestate, or their legal "representatives, the estate shall pass to the next of kin of the "intestate of the blood of the ancestor from whom the estate "came," it will not at all change the sense, but make it

more clear. As it stands, it is an explanatory clause equivalent to such proviso. The only anomaly in the statute is this 4th clause, which was evidently interpolated for the sole purpose of making heritable brothers and sisters of the half-blood of intestate, and not of the blood of the ancestor. Everything else is embodied in the 5th clause according to the obvious intent of the Legislature.

The brothers and sisters of the ancestor do, by the letter of the act, inherit out of their order—that is, where they are not next of kin, if there are half-brothers and sisters of the intestate—not of the blood of the ancestor—but no one can read the statute without feeling that this clause has its special wording giving it this effect by accident and mistake—not by design. In the case where there are such brothers and sisters of the intestate, the fifth clause does not, in terms, correct the irregularity, as it does in this case where there are "*no brothers or sisters;*" still I submit the general intent is so clear and certain that the Court would, in that case, regard it even against the letter of the clause, and thus, by just construction, make the act a consistent production, such as the Legislature intended it.

But it is urged that this is an ancient statute not now in force; that lands have been devised and titles grown up under it; and that, as able lawyers, nearly contemporaneous with the act, gave it the construction now claimed, this Court ought to give it such construction as will confirm, and not disturb, those titles. To this, I answer: In the first place there has been no judicial decision, in any of the Courts of Ohio, giving this statute the construction claimed for it. No case but this is known to have arisen in the State while the act was in force involving the question. No opinions of counsel are understood to have been given in support of it except in this case; and it is much more important to the ends of justice to know how the testator construed the act, than how the purchasers from the

brothers of the testator and their counsel construed it. It is the will of testator—not of parties or their counsel—that should control this case. There has been no laches to give opinion time to ripen into law. The plaintiff brought this suit as soon as the life under which the adverse possession was held fell in. How the testator construed the law, and the effect of this devise under it, is quite obvious on the face of the will. He certainly did not understand the law, and the devise which he made under the law, as passing the estate from his descendants to collateral relations on the death, without issue, of the child who held in remainder. If the law and the devise, together, be so construed as to produce such result, it will defeat alike the plain intent of the Legislature and of the testator.

On the whole, I think it clear that it was the intent of the Legislature which enacted the law in question that the estate should pass to the descendants of the ancestors from whom it came, so long as there were such descendants—and not leave them and pass to collaterals.

It was the intent of the ancestor who made the devise that the estate should pass to his issue, so long as such issue remained—and not leave them and go to collaterals.

If an artificial *rule* has defeated this double purpose, it is the *rule*, and not the law and the will of the devisor, that makes the devise.

T. EWING,
Attorney for Plaintiff.

Supreme Court of the United States.

JOHN DOE EX DEM., JOHN A. POOR, AND MARGARET R. POOR, HIS WIFE,

PLAINTIFF IN ERROR,

vs.

PATRICK CONSIDINE, EPHRAIM MORGAN ET AL.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

TO DECEMBER TERM, 1865. NO. , DECEMBER TERM, 1867.

H. H. Hunter

ARGUMENT FOR PLAINTIFF IN ERROR.

Nevins & Myers, Printers, Columbus, O.

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ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

The facts are embodied in the bill of exceptions [page 11, etc., printed record]. The case is ejectment. Both parties claim to derive title under *William Barr, Senr.*, deceased, who executed his will on the 24th day of February, 1816, which was duly proved and recorded after his death, on the 15th day of May, 1816 [copy, p. 15–16 of record].

The controversy relates to the lands devised by the first clause of the will to the testator's sons-in-law, *William Barr*, *James Keys*, and *John B. Enness*, IN TRUST for the uses specified in the will, during the lives of the testator's son, *John M. Barr*, and *Maria*, his wife, with remainder, *in fee*, to the child or children of said *John M. Barr;* or, failing these, to the said sons-in-law, and their heirs. These provisions of the

will—their construction—constitute the ground of controversy in the case, and will be more particularly rehearsed in the course of the argument.

At the time the will was made *John M. Barr* had one child, *Mary Jane*, then an infant. *John M. Barr*, his wife *Maria*, and daughter, *Mary Jane*, survived the testator.

John M. Barr died in August, 1820, his daughter, *Mary Jane*, in November, 1821, and his widow, *Maria*, in August, 1860; she being then the widow of *John Bigelow*, to whom she was married in 1824. *Mary Jane* died intestate, without issue, and without brother or sister. *John M. Barr* left no other issue.

The sons-in-law of the testator, *Barr*, *Keys*, and *Enness*, and their wives, daughters of the testator, survived him, and also survived *John M. Barr* and his daughter *Mary Jane;* but all died before the death of Mrs. Bigelow, each leaving families of children—the interests of all of whom, except two small fractional interests, are vested in the plaintiff's lessors, in right of the lessor, Margaret A. Poor, so far as any such right accrued to them, either by descent from said *Mary Jane*, or from the sons-in-law of the testator, *Barr*, *Keys*, and *Enness*, as devisees in remainder under said will, after the death of Mrs. Bigelow. The lessors are also vested with a fractional interest, equal to 1-30th part, undivided, of the premises, derived from the same source of title under which the defendants claim, not controverted by the defendants, and for which the verdict and judgment were rendered in the court below—the controversy being in relation to the remaining 29-30 parts, undivided.

The errors complained of, are to the instructions of the court to the jury, in regard to the law arising upon the facts set forth in the bill of exceptions [page 11 of record].

Two controlling questions are presented, the determination of either of which in favor of the plaintiff, must result in a reversal, namely:

First. Whether the devise over, of the remainder in fee, to the sons-in-law of the testator, *Barr*, *Keys*, and *Enness*, took effect on the death of Mrs. Bigelow, in favor of their heirs, they being dead, the issue of the said *John M. Barr*

having failed by the death of his daughter *Mary Jane*, without issue, in the lifetime of *Mrs. Bigelow?*

Second. Whether, assuming that the remainder in fee did not vest in the heirs of said sons-in-law, on the death of Mrs. Bigelow, in virtue of the devise to them, the said heirs at law, being also heirs at law of their deceased mothers—the daughters of the testator—did not *inherit* said remainder under the statute of descents governing the case, from the said *Mary Jane*, as *her next of kin, of the blood of the testator*, the ancestor, from whom the estate came?

Annexed, for convenience of reference, will be found a copy of the will, and of so much of the statute of descents as is material in the case:

THE WILL OF WILLIAM BARR.

In the name of God, Amen! I, William Barr, senior, of the town of Cincinnati, in the State of Ohio, being old and feeble of body, but of sound and disposing mind, memory, and judgment, praised be God for the same, do make and declare this my last will and testament, in the manner and form following, that is to say:

I give and devise unto my sons-in-law, William Barr, James Keys, and John B. Enness, of Cincinnati aforesaid, and to their heirs, all and singular that certain farm, tract or parcel of land, situate, lying, and being in the county of Hamilton, and State of Ohio, which I purchased of John Cross, containing one hundred and sixty acres, to hold the same premises to them and their heirs in trust (first) for the use of my son, John M. Barr, during his natural life; but nevertheless, to permit and suffer my son, John M. Barr, to hold, use, occupy, possess, and enjoy the said farm, and to receive and take the rents and profits thereof, during his natural life. And in case my said son, John M. Barr, should die leaving a legitimate child, or children, then, also, in trust for Maria Barr, wife of the said John M. Barr, in case she survive him, during her natural life, for the purpose of maintaining herself and the said child, or children, and educating the said children; but, nevertheless, to permit and suffer the said Maria Barr, wife of the said John M. Barr, to hold, use, occupy, possess, and enjoy the said farm, and to receive and take the rents and profits thereof, during her natural life. And upon the decease of the said Maria Barr, wife of the said John M. Barr, in case she survive him; if not, then upon the decease of the said John M. Barr, I do further give and devise the

remainder of my estate in said farm unto the legitimate child, or children, of the said John M. Barr, and their heirs forever. If my said son leave but one child, as aforesaid, then I give and devise the said farm to him or her, or his or her heirs forever. But if he leave two or more children, then I give and devise the said farm unto such children, and their heirs, to be equally divided between them. But should my said son, John M. Barr, die without leaving any issue of his body, then, and in that case, I do give and devise the remainder of my estate in the said farm unto my said sons-in-law, William Barr, James Keys, and John B. Enness, and their heirs forever.

And if the present wife of my son, John M. Barr, should survive him, he, the said John M. Barr, dying without leaving any legitimate issue, then I direct my said sons-in-law, their executors and administrators, to pay or cause to be paid unto her yearly, and every year, during her widowhood, the sum of two hundred dollars. And if during her widowhood, she should again be lawfully married, then I further direct my said sons-in-law, their heirs, executors or administrators, to pay or cause to be paid unto her the sum of one thousand dollars, unless the personal estate of my said son, John M. Barr, at his death, should exceed the sum of four hundred dollars; then, whatever the personal estate shall exceed the last mentioned sum shall be taken and deducted from the said sum of one thousand dollars; the said annuity and gift at marriage, or either, to be paid out of my personal estate. And I do hereby further direct my executors, hereinafter named, to finish or cause to be finished, in a plain manner, the house and kitchen at present erected on the farm aforesaid, for the use and occupation of the said John M. Barr, as soon after my decease as is practicable; the said expense to be defrayed out of such parts of my personal estate as are not especially bequeathed. Also, I do hereby empower and direct my executors, hereinafter named, to apply the proceeds of a debt due to me, when collected, by one Joseph McKinny, of the State of Pennsylvania, of two thousand fifty-one dollars and fifty-five cents, and the interest due or to grow due thereon, as, also, the proceeds of a debt due to me, when collected, by one Frederick Boas, of the State of Pennsylvania, of nine thousand five hundred and thirty-seven dollars fifty-two cents, and the interest due or to grow due thereon, together with the proceeds of the sale of my house and lot in the town of Shippensburgh, in the State of Pennsylvania, amounting to the sum of five hundred dollars, or so much thereof as may be necessary, towards the payment in full of the one hundred shares which I have purchased in the Miami Exporting Company Bank of Cincinnati, Ohio. Also, I give and bequeath unto my beloved wife, Mary Barr, the

entire income or dividend on the said one hundred shares in the Miami Exporting Company, as well after as before the payments thereon are completed, subject nevertheless and charged with an annuity to our beloved son, John M. Barr, of the sum of fifty dollars yearly, during his natural life; the first sum of fifty dollars to be paid in advance, within three months after my death, and thenceforward, at the expiration of each year from the date of such payment, until his decease. After the decease of my beloved wife, I will and bequeath the dividends of the said one hundred shares to be equally divided between my said sons-in-law, their heirs, executors and administrators; subject nevertheless to the annuity afore said to my son, John M. Barr, in case he survive my said wife. Also, I do further give and bequeath to my beloved wife, Mary Barr, all my household furniture, to be held absolutely as her property. Also, I give and bequeath unto my grandson, William Barr Keys, my gold watch. Also, I do further give, devise and bequeath the remainder of my estate, both real and personal, to my sons-in-law, William Barr, James Keys, and John B. Enness. Also, I direct my executors to pay my just debts, and all testamentary and other incidental expenses. Also, I will and appoint the said William Barr, James Keys, and John B. Enness, and the survivor or survivors of them, executors of this, my last will and testament; hereby revoking and making void all and every other will or wills at any time heretofore by me made, and I do declare this to be my last will and testament.

In witness whereof, I, the said William Barr, senior, have hereunto set my hand and seal, this twenty-fourth day of February, in the year of our Lord eighteen hundred and sixteen.

WILLIAM BARR. [L. S.]

The attesting witnesses were David Wade, Francis Carr, and David McKnight.

THE FIRST SIX SECTIONS OF THE STATUTE OF DESCENTS OF DEC. 30, 1815.

An act regulating the course of descents and distribution of personal estate.

§ 1. *Be it enacted, &c.* That when any person shall die intestate, having title to any real estate of inheritance lying and being in this State, which title shall have come to such intestate by descent, devise, or deed of gift from an ancester, such estate shall descend and pass in parcenary to his or her

kindred, in the following course: First—to the children of such intestate or their legal representatives: Second—if there be no children, or their legal representatives, the estate shall pass to the brothers and sisters of the intestate, who may be of the blood of the ancestor from whom the estate came, or their legal representatives, whether such brothers and sisters be of the whole or of the half blood of the intestate: Third—if there be no brothers and sisters of the intestate of the blood of the ancestor from whom the estate came, or their legal representatives, and if the estate came by deed of gift from an ancestor who may be living, the estate shall *ascend* to such ancestor: Fourth—if there be neither brother nor sister of the intestate of the blood of the ancestor from whom the estate came, or their legal representatives, and if the ancestor from whom the estate came be deceased, the estate shall pass to the *brothers and sisters* of the ancestor from whom the estate came, or their legal representatives; and for want of such brothers or sisters, or their legal representatives, to the brothers and sisters of the intestate of the half blood, or their legal representatives, though such brothers and sisters be not of the blood of the ancestor from whom the estate came: Fifth—if there be no brothers or sisters of the intestate, or their legal representatives, the estate shall pass to the next of kin to the intestate of the blood of the ancestor from whom the estate came.

§ 2. That if the estate come not by descent, devise, or deed of gift, but was acquired by purchase by the intestate, it shall descend to the children of the intestate and their legal representatives.

§ 3. That if there be no children, or their legal representatives, the estate shall pass to the brothers and sisters of the intestate of the whole blood and their legal representatives.

§ 4. That if there be no brothers or sisters of the intestate of the whole blood or their legal representatives, the estate shall pass to the brothers and sisters of the half blood and their legal representatives.

§ 5. That if there be no brothers and sisters of the intestate of the half blood, or their legal representatives, the estate shall ascend to the father, if the father be dead, then to the mother.

§ 6. That if the father and mother be dead, the estate shall pass to the next of kin to and of the blood of the intestate.

ARGUMENT.

I. The first question arises upon the construction of the following clause of the will: "I give and devise unto my sons-in-law, *William Barr*, *James Keys* and *John B. Enness*, of Cincinnati aforesaid, and to their heirs, all and singular, that certain farm, tract or parcel of land situate, lying and being in the county of Hamilton and State of Ohio, which I purchased of John Cross, containing one hundred and sixty acres, to hold the same premises to them and their heirs, in trust, (first) for the use of my son, *John M. Barr*, during his natural life; but nevertheless, to permit and suffer my son, *John M. Barr*, to hold, use, occupy, possess and enjoy the said farm, and to receive and take the rents and profits thereof during his natural life. And in case my said son, *John M. Barr*, should die, leaving a legitimate child or children, then also, in trust for *Maria Barr*, wife of the said John M. Barr, in case she survive him, during her natural life, for the purpose of maintaining herself and the said child or children, and educating the said children; but nevertheless, to permit and suffer the said *Maria Barr*, wife of the said *John M. Barr*, to hold, use, occupy, possess and enjoy the said farm, and to receive and take the rents and profits thereof during her natural life.

"And upon the decease of the said *Maria Barr*, wife of the said *John M. Barr*, in case she survive him, if not, then upon the decease of the said John M. Barr, I do further give and devise the remainder of my estate in said farm, unto the legitimate child or children of the said *John M. Barr* and their heirs forever.

"If my son leaves but one child as aforesaid, then I give and devise the said farm to him or her or his or her heirs forever; but if he should leave two or more children, then I give and devise the said farm unto such children and their heirs, to be equally divided between them.

"But should my son, *John M. Barr*, die without leaving any issue of his body, then, and in that case, I do give and devise the remainder of my estate in said farm unto my said

sons-in-law, *William Barr*, *James Keys* and *John B. Enness*, and their heirs forever."

Although the questions in controversy relate, exclusively, to the provisions of the will above quoted, other provisions also contained in the will, as well as facts outside of the will, influencing the mind of the testator, such as the members of his family and their circumstances, may be adverted to profitably, for the purpose of reaching the true testamentary intent of the provisions immediately in question.

The family of the testator consisted of his *wife*, his said son *John M. Barr*, his wife *Maria*, and their infant daughter, *Mary Jane*, his *three daughters*, wives of his sons-in-law, and their several families of children. These were the natural objects of his bounty.

In making his will his first care is to devise the fee of the farm intended as the main provision for his son, *John M. Barr*, and his wife and child or children, to his three sons-in-law, *in trust*, for the uses expressed, as in the clause above quoted. These uses constitute the provision intended for his said son and his wife and child or children, except a provision for repairs on the house, a contingent annuity of $50, and a pecuniary provision in favor of his son's wife, in case she survived him, &c., subject to be modified in the event of her marrying again. The devise in trust to the sons-in-law, of the fee of the lands, was most probably made in view of the fact that the said "*John M. Barr, at the date of the will, was a man of intemperate habits.*" [Page 14 of record.]

Having made these provisions for his son and his son's family, the testator provided for *his own* wife, by directing certain funds to be invested in bank stocks, the dividends of which were to be paid to her during her life. Then, after some small specific bequests, and a provision for the payment of his debts, the testator further gives, devises and bequeaths the *remainder* of his estate, both real and personal, to his said sons-in-law, *William Barr*, *James Keys* and *John B. Enness;* but in a previous clause he provided, that after his wife's death, the dividends of the stock should go to his said sons-in-law, to be equally divided, &c. And in conclusion, he appoints his said sons-in-law, and the survivors of them, executors, &c.

The whole will, in one general view, is thus made up: Provision is made for the support of the testator's wife—also under the protection of a trust for his intemperate son and his wife and children—and, except two small specific bequests, the entire *residue* of his estate is given to the testator's three sons-in-law, and they are appointed the executors of his will. No provision is made for his daughters—except by implication through their husbands, the sons-in-law—and not one word is found in the whole will indicative of any intention that any collateral friend or relative should, in any event, be the recipient of his bounty or participate in his estate. The grandson, *William Barr Keys*, as is usual in such cases, being the old gentleman's favorite namesake, was the recipient of his gold watch; and this was the only instance of any provision for any descendent, save in one form or another, to, and through his children,—the sons-in-law, evidently, in the mind of the testator, occupying the place of his daughters, their wives. Having provided for his wife, and his son, and his son's family as he chose, the *residue* of his estate, in natural course, should go to his daughters, and he chose to give it to them by giving it to their husbands—*they* had his confidence—he made them trustees for his son, executors of his will, and, contingently, upon the failure of issue of his son, devisees in remainder, after the death of the son and the son's wife, of the farm given to them for life.

Now, in the light of this general view of the subject, and the relations, confidential and otherwise, between the parties, the devise to his son and his son's wife, being for life—to whom, is it probable, the testator intended the farm so devised should pass at the termination of the life estate, in the event of the failure of issue of his son, who were, in the first instance, to be the devisees in remainder? Can it be supposed that he had any intention, express or implied, that it should pass to his *collateral* kindred, his brothers and sisters or their representatives, in preference to his daughters or their husbands?

This regards the testator's *general* intent; and about this, we think it impossible that there can be the slightest question or doubt. Whether this clearly ascertained *general*

intent is to be frustrated or supplanted by some technical effect of language employed in the will, manifestly not intended for any such purpose, but for another and wholly different purpose, is the question to be resolved.

John M. Barr died, leaving his wife *Maria*, and their daughter *Mary Jane*, surviving him. *Mary Jane* afterwards died, intestate, without issue, and without brother or sister —her *next of kin*, at the time of her death, *of the blood of the testator*, being her aunts, the testator's daughters, *Mrs. William Barr*, *Mrs. Keys*, and *Mrs. Ennes*.

If the estate were so vested in said *Mary Jane*, subject to the continuing life estate of her mother, *Maria Barr*, afterwards *Maria Bigelow*, as, that it descended to her heirs at law, and did not pass by the devise over to the testator's sons-in-law, *Barr*, *Keys* and *Enness*, we claim, on behalf of the plaintiff, that it passed to and vested in her said aunts, as her heirs at law under the statute.

On the other hand, the defendants claim and insist that said *Mary Jane*, at the time of her death, was seized of the remainder, in fee; that the remainder over to the sons-in-law, did not take effect under the circumstances, and that, by virtue of the statute, the remainder passed by descent from her to the brothers and sisters of the testator, and not to his children.

Waiving, for the present, the question upon the construction of the statute, we insist that the devise over to the sons-in-law did take effect, and that upon the death of the widow, *Mrs. Bigelow*, in 1860, the lessors of the plaintiff, and those under whom they claim, being the representatives of said sons-in-law, became entitled to the possession, and are entitled to recover, in this action.

The question arises upon these clauses of the will:

"And UPON THE DECEASE of the said *Maria Barr*, wife of the said *John M. Barr*, in case she survive him; if not, then UPON THE DECEASE of said *John M. Barr*, I do further give and devise the remainder of my estate in said farm, unto the legitimate child or children of the said *John M. Barr*, and their heirs, forever." * * * "But should my said son, *John M. Barr*, die without leaving any issue of his body, then, and in that case, I do give and devise the remainder of my

estate in said farm, unto my said sons-in-law, *William Barr*, *James Keys* and *John B. Enness*, and their heirs, forever."

The ground assumed by the defendants is, that the devise over to the sons-in-law is, in terms, only to take effect in the event that *John M. Barr* should *die without leaving any issue of his body*—which event, they say, did not happen: on the contrary, that he died leaving issue, his daughter *Mary Jane;* and we may concede, that, if no attention is to be paid to the testamentary intent beyond these words, considered abstractly, and disconnected with any thing else, this claim of the defendants would be, logically, well founded.

But is that the proper and safe way to arrive at the intention of the testator? Is it according to the most approved method, or such as is recommended by enlightened and intelligent judicial tribunals, for the purpose of ascertaining the proper construction of written instruments, and especially of wills? By no means.

In the case of *Thompson* vs. *Thompson*, 4 O. State R. 351—the question being as to the intention of a testator—it was said by the court: "The terms of a will are not, of necessity, to be construed technically and with a strict reference to grammatical accuracy; but they are to be viewed sensibly and liberally, in order to give effect to the testator's intentions. Of all the instruments that need the benefit of a liberal construction—a construction that prefers substance to mere form—*wills* need it the most."

The will in question, in express terms, contains a devise over to the sons-in-law of the remainder in question—technically an executory devise—being a remainder in fee limited to take effect after a remainder in fee. It was intended to take effect in the event of the failure of the previous devise of the remainder in fee, to the child or children of John M. Barr. When the will was made *John M. Barr* had a living child, the said Mary Jane. She was in being, and beyond a doubt, was in the contemplation of the testator; and upon technical principles, the estate in remainder, vested in her on the death of the testator, *if he intended a vested remainder to take effect, in behalf of the child or children of* JOHN M. BARR, *before the termination of the estates for life.*

But did he so intend? It cannot be so held without disregarding the express language of the devise over, and the clear intention of the testator. The language of the devise is: "And *upon the decease* of the said *Maria Barr*, wife of the said *John M. Barr*, in case she survive him; if not, then *upon the decease* of the said *John M. Barr*, I do further give and devise the remainder of my estate in said farm unto the legitimate child or children of the said *John M. Barr*, and their heirs forever."

Now, why were these words, "*upon the decease*," thus carefully repeated in reference to the death of each tenant for life, introduced, or used, at all? Are they to be regarded, or disregarded, in construing the will? Surely they must not be disregarded. Then what is their meaning, use, and effect? Clearly this—to express the intention of the testator to suspend the time of the taking effect of the devise of the remainder to the child or children of *John M. Barr*, to the time of the termination of the estates for life. Till the happening of that event, the devise to the child or children was contingent. If at that time there were no child or children or their descendants (the legal meaning is *issue*) of *John M. Barr*, the devise would fail, lapse; but if there were such child or children *(issue)* it would *then* vest, and pass in fee, in the language of the devise, to them and "*their* HEIRS *forever*." We have been unable to conceive of any other sensible meaning to be given to these words, "*upon the decease*." They surely are restrictive, in the ordinary use of language, upon the devise with which they are coupled, and limit the *time* at which it is to take effect, to the time of the happening of the event designated, namely, the decease of the surviving tenant for life. Now why should the testator so provide? The reasons that influenced him were natural and obvious, and are manifestly discernible from the next succeeding devise over of the same estate in remainder—the inherent possibilities of events, and the relations of other branches of his family, in his affection and confidence. The taking effect of the devise in remainder, was made to await the termination of two lives—lives of young persons—a son of the testator and his wife—young married people, having one child, and who might probably have more.

According to natural affection, the child or children of that son would be preferred to succeed to the inheritance at the termination of the estates for life, if they or their issue should, at that time, be in being. But the period of the duration of the estates for life might be protracted; it did continue during a period of more than forty years. Before it should transpire, changes were probable—the son might have other children; if so, they should be, and were, provided for. But *they* might, also, all perish; *that* was also a contingency that should be provided for. We say it was provided for exactly in accordance with natural impulses under the circumstances, by the contingent devise over to the sons-in-law, who enjoyed the confidence of the testator—the husbands of his daughters, and the proper representatives of their interests and of the interests of their respective families of children. Who that is a man, and conversant with human motives, influenced by like circumstances, is there, that does not feel the force of the truthfulness of these suggestions of motives? Whatever was done by this old man, in the disposition of his property, all must be sensible, that the motives alluded to were in full operation upon him, and influencing his action. In accordance with these motives, we find, in the succeeding clause of the will, after provision is made for an equal distribution between John's children, if there should be more than one, a devise over, of this estate in remainder, contingent upon the failure of issue of the said son, to the testator's three sons-in-law, by that designation, and by name.

But, say the learned counsel of the defendants, the failure of issue of *John M. Barr*, upon which, in the language of the will, the devise over to the sons-in-law was to take effect, was very special, and limited to its happening in only one particular way, which did not happen, and, therefore, that said devise over did not, or could not, within the technical meaning of the language employed, take effect. Or, perhaps they will say, that the devise over was not limited to take effect upon the *failure of issue* of John M. Barr at all, but upon the simple contingency that *John M. Barr* "*should die without leaving issue of his body.*" We ask in reply, bearing in mind the essential substance of the subject matter—the object in

the contemplation of the testator—whether the dying of *John M. Barr*, "without leaving issue of his body," is anything more or less than the failure of his issue? Could it have been, in the estimation of the testator, a matter of any moment to take into account any other time, at which there should be a failure of John's issue, than the termination of the estate for life, if, in the meaning of the will, that was the time intended for the taking effect of the devise to the child or children of John? The answer is obvious. And it is manifest that the language, "But should my son *John M. Barr* die without leaving any issue of his body," was adopted as a *form of expression*, meaning, in reality, "without leaving issue of his body at the termination of the life estate." That this is the true meaning, we desire to draw particular attention to a fact now to be named, apparent in the phraseology of the will in this immediate connection, relating to the death of *John M. Barr*. The estate for life might terminate at the death of either his wife *Maria*, or that of said *John M. Barr*. The draftsman, framing the devise to the child or children of John M. Barr, which, as above shown, was to take effect on the termination of the estates for life, makes the provision depend, in the first instance, upon the decease of said *Maria*, in case she should survive her husband; but then, as *he* might survive *her*, it was obviously necessary to provide for the other contingency, namely, *his* surviving *her*. Therefore the expression is, "*if not*, (that is, if she did not survive him) *then upon the decease of the said John M. Barr*, I do give and devise the remainder," &c., "to the legitimate child or children of the said *John M. Barr*," &c. Then, upon that, follows the devise over to the sons-in-law, in this language: "But should my said son *John M. Barr* die without leaving issue of his body," &c.—that is, *if he should survive his wife*, and *then and in that case*, at the time of *his* death, which would terminate the estate for life, "should he die without leaving issue of his body," the devise over was to take effect to the sons-in-law.

To all who are accustomed to thread out the meaning intended to be expressed by words or language adopted by persons not critically exact, in expressing, in writing, a matter like this, somewhat complex, the force of what has just been

said will be readily appreciated. It is not put forward, however, as a theory *necessary* to be adopted in reaching the conclusion for which we contend. That conclusion, we believe, stands on higher ground; *this* may, however, add strength to it.

We have, as above, endeavored to establish that it was not the intention of the testator, that his grand-daughter, *Mary Jane*, who was in being at the date of the making of the will, should take a remainder, to vest on *his* death; but only a contingent remainder, to vest in the child or children (*issue*) of his son, and take effect on the death of the son, or other termination of the estate for life, with remainder over in fee to the sons-in law, failing the issue of John.

We now propose to show, negatively, that it could not have been the intention of the testator to have vested in his living grand-daughter, *Mary Jane*, the remainder in fee, unconditionally, to take effect at his death, subject to open and let in after born children, issue of his son, *John M. Barr;* especially if, as claimed by the defendants, the brothers and sisters of the testator, and not his daughters, the wives of his sons-in-law, were, under the statutes of descents then in force, the heirs apparent of said *Mary Jane.*

If the remainder, virtually provided for in behalf of the testator's living grand-daughter, *Mary Jane*, were intended to be a *vested* remainder, it would, on well understood principles of law, on her death, pass to her heirs *general*, whoever they were. Having made this devise, having that legal result in case of the death of said *Mary Jane*, or any other child or children of the son that might be born into the world, the testator, in the very next clause of his will, sets about making a further disposition of the property, already definitely disposed of in such way, if what is claimed by the counsel of the defendant be tenable, as to have placed it absolutely beyond his power to make any further disposition of it. He provides for a further disposition of the property, contingent upon an event to take place *after* his, the testator's death, namely the death of *John M. Barr*, without leaving issue of his body. The idea is, as it was, incontestably, in the mind of the testator, that the child, *Mary Jane*, would survive *him*,

and then afterwards die,—her father surviving,—and then her father die, *without* leaving issue of his body, (which could only be by the death of *Mary Jane*, without issue) then, and in that case, the devise over to the sons-in-law should take effect. But the learned counsel argue that the remainder to Mary Jane was a *vested* remainder, and that on her death the estate passed to *her* heirs at law, and that, leaving no issue, or brothers or sisters, their clients, or those under whom they claim, were *her* heirs at law; and therefore, that the devise over to the sons-in-law never could take effect. Now, if this be true, it is not because *Mary Jane* died *after* her father, but because the devise in remainder to her was a technical vested remainder; and that was as much the case *before* as *after* the death of her father,—and it follows, that if the testator intended a *vested* remainder, in the devise to the child or children of *John M. Barr*, to take effect immediately on *his*, the testator's death, in behalf of the child *Mary Jane*, who was in being, it was a mere absurdity for him to make the devise over to the sons-in-law. We suppose he did not intend any such absurdity, but that he did intend, and so understood the devise to the child or children of *John M. Barr*, of the remainder, to be such, as admitted of his disposing of it to his sons-in-law, if at the termination of the estates for life, there were no *issue* of his son in whom it could vest.

In passing we have said the words "child," or "children," mean "*issue*," in the connection in which they are here used. This is obviously the meaning in reference to the time when the estate was to become vested, if, as we claim, *that* was to be, at the termination of the estates for life; in that case the word "*heirs*," as used, means "*issue*."

As to the meaning and effect of the word "*heirs*," as used in this devise, we refer to *King* v. *Beck* (15 O. R., 559). It is there said that "a devise to one and his *heirs*, to be used by the devisee for life, with remainder over to a third person, will not vest the fee in the devisee, under the rule in Shelly's case, *if such construction would defeat the manifest intention of the testator.*" Also this in the same case: "The words '*heir*,' or '*heirs*,' in a will, if such was the clear intent of the testator, may be construed "*child*," or "*children*," and *they* will take as purchasers."

The principle here enunciated is forcibly applicable to this case in another point of view, namely,—it is incontrovertible that the testator did devise over the estate to his sons-in-law, to take effect upon *some* contingency, after the failure of the previous devise to the child or children of his son *John M. Barr*. It is also manifest that the devise to the child or children of *John M. Barr* has failed, unless the words "*their heirs*" are to be construed as words of limitation, and the devise be holden to have *vested* in *Mary Jane* at the death of the testator; and as this can not be done without rendering the devise over to the sons-in-law meaningless, the words "*their heirs*," as here used, must be holden to be words of purchase, and mean "*issue*." To hold otherwise would be to give an effect to his will never intended by the testator; and if the construction of the statute of descents, claimed by the counsel for the defendants, be sustained, the effect will be not only to defeat the devise to the sons-in-law, but also to vest the estate in collaterals to the disinherison of his own children.

The doctrine of the Supreme Court of the State of Ohio in an analogous case in principle—*Brewster* vs. *Benedict*, 14 O. R. 368–384—applies forcibly to this case.

In that case the testator, David M. Benedict, devised one-fourth part of his estate, both real and personal, to his brother, Jonas B. Benedict, and his heirs and assigns forever, *in trust*, to invest the same to the separate use of his sister, Eliza Ann Brewster, wife of William Brewster; and if said Eliza Ann should die during or within the lifetime of her said husband, then in trust to pay, transfer and convey the same to the child or children of the said Eliza Ann and their legal representatives and their heirs and assigns forever. But if there should be no child or children, or their representatives, then over to his brothers and sisters.

Said Eliza Ann died before the testator, leaving two small children, who survived the testator a few months, and died intestate. William Brewster, the husband of said Eliza Ann, survived, married again, and had another child by his second wife.

The case came under the act of March 7, 1835 and the

question was between the brothers and sisters of the testator and the half brother of the two deceased infant children of the said Eliza Ann, by the second marriage of their father. The decision was in favor of the brothers and sisters of the testator upon two grounds, each equally distinct.

First. On the ground of the testator's intention, arising upon the terms of the will and the relations of the parties. The claim in behalf of the half brother, was founded upon the statute, according to which it was claimed that the devise, not being from an ancestor in the regular line of descent to the deceased infant children (the intestate being the survivor of said children), the estate descended from them to their said half brother. In answer to this, Judge Hitchcock, delivering the opinion, said: "This, surely, is not according to the intention of the testator. *He did not intend that his estate should, under his will, be transmitted to those who were not of his blood.*" And in concluding the opinion, the Judge remarks: "So that, whether the estate is to be governed *by the manifest intention of the testator* as expressed in his will, or by the statute of descents, the result is the same."

The second ground of the decision negatived the claim of the half brother in regard to the devise not being from an ancestor, within the meaning of the statute; but the distinct effect of the decision is, that if the construction of the statute in that respect had been as claimed in behalf of the half brother, the *intention* of the testator being to the contrary, would govern the case.

In the case cited, the learned and very able judge who delivered the opinion, after announcing the testator's intention, says: "Now, is this intention to be defeated by any *rule* of construction heretofore adopted? and here I must be permitted to say that these *rules*, in most cases, are applied, not for the purpose of ascertaining but of defeating the intention of a devisor or testator."

The following further enunciation of the principles applied by the Supreme Court of Ohio, whence this case comes, in cases of this class, is entitled to weight and respectful consideration, laid down in *King* vs. *Beck*, cited above (15 O. R. 559):

"The intention of the testator must govern, if it be not unlawful or inconsistent with the law. The control over

the intention by the rules of law, applies not to the construction of *words*, but *the nature of the estate*. A testator may use such words as he may please to convey his intention, and such intention, if clearly manifested, will be carried into effect, if it be not unlawful."

Lessee of Worman vs. *Teagarden*, 2, O. State R. 380: "In construing a will, grammatical accuracy need not be observed, and it should be read with a view to the situation and circumstances of the testator, in reference to the subject disposed of and the objects of his bounty."

The intent of the testator was to provide for his descendants, each and all of them, by legacies direct to them, or through their parents; and each devise should have, if its language will permit, such construction as will carry into effect that general intent. In this devise, *children* and *issue* are used indiscriminately—*children* occurring several times, *issue* twice—to express the same thing; either term, therefore, may be construed to mean the other where it will best meet the general intent. *Wythe* vs. *Thurston*, Ambler, 555, S. C., 1 Ves. Sen. 196; *King* vs. *Beck*, 15 O. R. 564; *Colier* vs. *Colier*, 3 O. S. R. 375; and vide *Parish* vs. *Ferris*, 6 O. S. R. 579, foot of the page.

In the case of *Ellicomb* vs. *Gompertz*, 3 Mylne & Craig's Chancery R. p. 154, it was said by the Lord Chancellor, *Cottenham:* "The result of all the authorities is that, in such cases as the present, *if it be necessary* to put a restricted *sense* upon the words used in the gift over, *in order to effectuate the intentions of the testator as evidenced by other parts of the will, it is competent for the court to do so;* and being satisfied, for the reasons I have before given, that the intention of the testator was, that the *gift over should take effect* upon the failure of the objects particularly described as the objects of his *prior* gift, I am of the opinion that I must hold L. G. to be entitled," &c.

This language fits our case precisely, and is quoted and followed by the Supreme Court of Ohio, in *Evans and others*, 10 O. St. R. 315.

In *Malcom* vs. *Taylor*, 2 Russell & Mylne, 41[illegible] Leach, Master of the Rolls, said: "It is a reasonable intendment that a *subsequent limitation* is meant to take effect

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In *Malcom* vs. *Taylor*, 2 Russell & Mylne, 416, Sir John Leach, Master of the Rolls, said: "It is a reasonable intendment that a *subsequent limitation* is meant to take effect

upon a failure of the prior gift, and as a *substitution*, in that event."

And in *Stevenson* vs. *Evans and others*, *supra*, it was held: "When in a will there is a devise for life, and then to the children of the tenant for life, *in fee simple*, and then a limitation over, if such tenants for life *should die without leaving heirs lawfully begotten of their or either of their bodies*, that the latter words are to be construed with reference to the former; and that *the heirs of the body*, intended by the testator, are the *children* of the tenant for life designated in the prior limitation."

The effect of this holding, it will be seen, on reference to the case, was, to pass the inheritance according to the limitation over, notwithstanding the devise to the *children* of the tenant for life was in express terms "*in fee simple*," the legal meaning of which terms is precisely equivalent to the terms of the devise in question, namely, to the child or children of the tenant for life (John M. Barr), *and their* "*heirs*."

What we claim is, that the testator used the terms "*child or children*" in one part of his will, in the same sense in which he used the word "*issue*" in another part of it; and that the words "*child or children*," which innately mean "*issue*," were used and intended by the testator to be understood in the sense of "*issue*." The devise over to the sons-in-law is, in its proper meaning, to take effect in default of *issue* of John M. Barr at the termination of the life estate.

This has been controverted in argument by the learned counsel of the defendants, in their leading proposition, which is, that the devise, being to the child or children of John M. Barr, and *their heirs*, and the child *Mary Jane*, having survived its father, and died before its mother, without issue, the inheritance passed by descent, under the statute, to collaterals, away from the family of the testator, and not by the devise over to the sons-in-law; and in support of this proposition it was further argued that it must be so, because, it was said, that if the child *Mary Jane* had died before its mother, leaving *issue*, such issue would have taken the estate. We admit that the issue, in such case, would have taken; but in virtue of what right? Surely not as *heirs at law* of *Mary Jane*, although her issue would truly be *her* heirs at law, but

under the will of the testator, as devisees—purchasers, in law. This is the inevitable effect, if the intent of the testator to secure his estate to his own family, and not to collaterals, be attended to and admitted.

It has been argued by counsel for the defendants, that upon the construction claimed by us, "grandchildren could not take." This is a mistake; we say they not only could take, but *must* take, and that if the daughter *Mary Jane* had married, had lawful issue, and then conveyed *her title and interest* to a stranger and died, leaving such issue, and such issue had survived Mrs. Bigelow, the surviving tenant for life, the issue would have taken the estate against the purchaser from said Mary Jane. Would the court have any doubt as to the intention of the testator in such a case? If we are right in this view, it is decisive of the case before the court.

In the case of *Gale* vs. *Bennett*, Ambler, 681, as in the present case, the first direct bequest was made to *children* and *not to issue;* but the limitation over being made dependent upon the death of persons without issue, it was held to clearly indicate the testator's intention to have been, to annex to the word "*children*" the same sense he had given to the word "*issue.*" In that case, "the testator, having four daughters, *Hester, Clara, Mary* and *Elizabeth*, devised real and personal estate to *Hester* for life, remainder to all the children of her body, sons and daughters, as tenants in common, in fee, with benefit of survivorship, if any of the sons died under twenty-one, or daughters before that age or marriage; and in default of such '*issue,*' then to all his *other* daughters living at the death and failure of issue of Hester, and the '*child* or *children*' of his other daughters who should then be dead, as tenants in common, in fee; but if none of his daughters, nor any '*issue*' of them, should be living at the before mentioned period, he limited the property to his own right heirs. *Hester*, the tenant for life, died without issue. *Clara* died before her, and there were only grandchildren of *Clara* living at the death of *Hester;* and *Elizabeth* died before *Hester*, leaving two children, who were living at Hester's death. *Mary* survived *Hester.*"

Lord Camden decided, on the authority of *Wythe* vs. *Blackman* (1 Ves. sr. 196; Ambler, 555), "that grandchildren were

entitled under the terms of the will; which was equivalent to a declaration, that the testator used the word '*children*' in the same sense as the term 'issue'—a term significantly comprehensive to include grandchildren." 1 Roper on Legacies (1st Amer. ed.), 70–71.

On the same principle, we claim that the testator did not intend that, if the child of John M. Barr had died before the remainder vested in possession *and left children*, that those children should be cut off from the benefit of the devise, if they survived the determination of the life estate, which could only be by construing the term "*child* or *children*" to mean the same thing as "*issue*."

The result is, that the lands in question were devised in fee to the sons-in-law, in trust, for the use of John M. Barr for life; and if he died leaving *issue*, then to Maria Barr, &c., during her life; and upon her death, remainder to the issue of John M. Barr, but if he died without issue, or failing his issue *at the termination of the life estate*, remainder to the sons-in-law.

In aid of that object, and as a part of his arrangement to effectuate his intention, the fee of the lands was vested in the sons-in-law, *in trust*, there to remain to the termination of the estates for life. This trust has been referred to as a "*dry trust*," involving no active duties on the part of the trustees. But, however that may be, we presume it will not be doubted, but that up to the time of the termination of the life estate, the fee of the estate was vested in the trustees. We need not inquire whether, under the circumstances, active duties might not, in the mean time, have been devolved upon the trustees. We think there would have been, if the widow had been ousted by a wrong-doer. Be that as it may, the legal title was vested in them, in trust, and it cannot be pretended, that, so long as the life estate continued, they could have been required, by any body interested, to convey to them the legal title; or that if the statute of uses of England had been in force in Ohio, that the use would have been executed by operation of the statute, *so long as the estate for life continued*. But the statute of uses has never been enacted, and has not ever been in force, in Ohio. *Helfenstein* vs. *Garrard*, 7 O. R. 275; Jarman on Wills, 196.

Now what was the testator's intent in creating this "*dry trust*"—in placing the legal title pending the estate for life, in the hands of his sons-in-law—the favored representatives of important branches of his family—his residuary legatees, and chosen executors of his will? Is it not obvious, that it was to the intent that, if the *issue* of his son should fail in the mean time, and none of *that* branch of his family, whom it was the particular intent of the testator to prefer in respect to this property, survive, the title should then be in the possession of his other chosen representatives, his sons-in-law, in whose behalf was included in his will the alternative devise of the remainder? Or, will it be pretended that it was within the contemplation of the testator, or that it was any part of his intention, that, in the event that did happen, namely, a failure of the issue of his son, John M. Barr, at the termination of the estates for life, the trustees should convey the legal title to his (the testator's) brothers and sisters, to the disinherison of his own daughters, and in disregard of the devise over to the sons-in-law themselves?

No, may it please the honorable court, whatever may be the conclusions of technical legal erudition, in its searching for this testator's testamentary intention, certain it is, to the apprehension of plain common sense, that no such intention as *that*, predicated upon a really unmeaning technical phrase—unmeaning for any practical purpose in the connection in which it was used—relied upon by the counsel for the defendant, was for a moment ever entertained by this testator—and may we not be permitted to say, that which we feel, with profound deference to the tribunal we address, that it would be a reproach to the law, if in such a case, it shall be found necessary so to administer it.

But we do not feel that we ask the court, under the pressure of the manifold equities of our case, to disturb any landmark, or any well considered adjudication; but we ask that, if consistently with principle and precedent it can be done, this will shall be so construed, as, *within the limits allowed by the law*, to control this inheritance, and to vest it in the posterity of the testator,—the man who spent his life in earning it—rather than in strangers, who seek to speculate upon his earnings.

II. Admitting that the child, *Mary Jane*, became vested with the remainder in fee, and died seized of it, intestate, without issue, and without leaving brothers or sisters, to whom did it pass at her death, by the statute of descents then in force?

The estate came to her by descent, and is governed by the *first* section of the act which prescribes the following course of descents:

Clause First.—To the children of the intestate or their legal representatives.

Clause Second.—If there be no children or their legal representatives, to the brothers and sisters of the intestate, of the blood of the ancestor from whom the estate came, whether of the whole or half blood.

Clause Third.—If there be no brothers and sisters of the intestate, of the blood of the ancestor from whom the estate came, or their legal representatives, and if the estate came by deed of gift from an ancestor who may be living, the estate shall *ascend* to such ancestor.

Clause Fourth.—If there be neither brother nor sister, of the blood of the *ancestor* from whom the estate came, or their legal representatives, and if the ancestor from whom the estate came be deceased, the estate shall pass to the *brothers* and *sisters* of the *ancestor* from whom the estate came, or their legal representatives;—and for want of *such* brothers or sisters or their legal representatives, to the brothers and sisters of the *intestate*, of the half blood or their legal representatives, though such brothers and sisters be not of the blood of the ancestor from whom the estate came:—

Fifth.—If there be no brothers or sisters of the intestate or their legal representatives, the estate shall pass to the *next of kin* of the intestate *of the blood of the ancestor* from whom the estate came.

In the case in hand, the *first*, *second* and *third* classes are wanting; but the *next of kin* of the *intestate* of the blood of the *ancestor* from whom the estate came, living at the death of the *intestate*, were the *three daughters* of said *ancestor;* and the plaintiff's lessors are their heirs at law, in part, and in part claim by purchase from such heirs. They are clearly entitled to the inheritance under the *fifth* clause of the sec-

tion, unless upon a proper construction, the *brothers and sisters* of the *ancestor* from whom the estate came, are by the *first* part of the *fourth* clause of the section, to be preferred to his *children*.

In favor of that construction, no other reason can be assigned than that the *fourth* clause is inserted *before* the *fifth*, in successive order, in framing the section. This is entitled to consideration; but we submit that it is a mere mechanical arrangement, which on no sound principle should be permitted to control the legislative intention otherwise apparent. Although the general mechanical structure of the different parts of the act is such that the successive priorities in favor of one class of legal representatives of an intestate over another, is generally indicated by the successive order observed in the structure of the act, yet, as before said, that is not, upon any sound principle, such a circumstance as should have a controlling effect, or subvert the manifest intention otherwise apparent.

The first section of the act prescribes a course of descent for real estate of inheritance, the title to which came to the intestate, by devise, descent or deed of gift from an ancestor. The principle to be applied in cases of that class, as contra-distinguished from cases of title acquired otherwise, is marked and distinct—namely, after representatives of the *intestate* of the *first* degree—*children*—the principle is adopted with reference to degrees of consanguinity to both the *intestate* and the *ancestor from whom the estate came*, on the part of the representative who is to take the estate. The natural order is regulated first in reference to the intestate: Thus, if there be no *children* of the intestate, the next class in order is the *brothers and sisters* of the *intestate;* but these must be of the blood of the *ancestor from whom the estate came.* If there be none of these, and the *ancestor* be living, the estate is to go back *to him.* Being returned to him, a new course of descent *from him* would arise in case of his death intestate,—and according to the principles of the statute, it would first of all go to his children. Then, according to the principle, thus far, if the *ancestor* from whom the estate came were dead, the descent should be to

his children, from the *intestate*, if they were also the *next of kin* of the *intestate*. This, we think, is undeniable, according to the principle indicating the legislative intent; and *that*, applied to the circumstances of this case, would make the *fifth* clause of the section apply before the fourth in order. It would give the inheritance to the daughters of the testator, who were also the aunts of the *intestate*, priority over the brothers and sisters of the testator.

Now, it may very well be, that, in some other supposable cases, the relations of the parties would be such that, upon the same principle for which we contend, the *brothers and sisters* of the *ancestor from whom the estate came*, would stand before others, who could only claim to inherit by force of the *fifth* clause, in which case *such brothers and sisters* would, of course, be let in, in the order in which the sections is framed. Thus: Suppose A conveys lands by deed of gift to his nephew B, and dies without issue, but leaving a brother, C, the uncle of B; and B, after the death of A, also dies intestate, without issue, and having no brother or sister. It is clear that C, the uncle of B, is his *next of kin* of the blood of the *ancestor*, A, from whom the estate came; and being the brother of A, the lands would pass, by force of the first part of clause *fourth*, to C.

But if A had left *issue*, all other facts being the same, such *issue* could not take the lands under the *fourth* clause; but would take it under the *fifth*.

The case *last* supposed would be precisely parallel with the facts of the case in hand and *demands* the application of the *fifth* clause; whilst the case *first* supposed, being in conformity with the requirements of the *fourth* clause, would *demand* the application of that clause.

~~The soundness and reasonableness of the construction we thus claim, and the inconsistency and unreasonableness of the construction claimed by our opponents, will be made more manifest by considering the practical bearing of the *second* part of the *fourth* clause.~~

~~This part of the fourth clause provides, in substance, that "for want of brothers and sisters of the *ancestor*, the estate shall pass to the brothers and sisters of the *intestate* of the *half* blood, or their legal representatives, though such broth-~~

ers and sisters be not of the blood of the ancestor from whom the estate came."

If this provision is to have effect in the *order in which it stands in the section*, without reference to anything else, its plain effect would be, when applied to the facts of this case, if there were no brothers or sisters of the *testator* living, or their legal representatives, and if Mrs. Bigelow had happened to have had a child born of her second marriage, who would have been a brother or sister, of the half blood, of *Mary Jane*, though a total stranger in blood to the *testator*, such child would have inherited the estate in question, to the prejudice of the testator's three daughters.

Now the principle, or rather the violation of principle, as applied in such a state of case, is so gross as to arrest the attention strongly, and almost make one exclaim; but in reality it is the same thing over again, only changing the form, slightly of the facts, as that which is insisted upon by our antagonists.

It will be noticed that, whatever of enormity may be produced by such a perverted understanding of these provisions, it results entirely from *construction*; and that there is an easy remedy for the evil, by simply applying a *reasonable* construction, disembarrassed by the mere *order* in which the different clauses happen to be inserted in the section.

In the case of *Curren et al.* v. *Taylor et al.*, 19 Ohio Rep. 40, it was said by the court, that "In putting a construction upon the statute, or parts of it, we, as a court, at least, would feel called upon to give attention to the *principle so recognized in the law of descents.*" This was said in reference to a different state of facts, but sustains our theory of construing the provisions in hand.

We beg leave, in this connection, to refer again to the case of *Brewster* v. *Benedict*, 14 Ohio Rep. 468, 484, cited above, in which the eminent Judge who decided the case refused to give a similar provision of the statute of descents such a construction as would defeat the manifest intention of a testator, and divert away his property *from his family*, into the hands of a stranger (half brother) in blood.

It will be observed that the construction we contend for will not in the least impair the effect of each of the clauses

of the section in their proper application to facts as they may arise in cases.

It is also worthy of remark that the *third*, *fourth* and *fifth* clauses of the section, each, provide, in different aspects, for one and the same contingency; and upon that contingency, namely, "*if there be no brothers or sisters of the intestate*," either of the whole or half blood, the *fifth* clause provides that the estate shall in every case and without any exception, pass to the *next of kin* of the intestate, of the blood of the *ancestor* from whom the estate came.

Full effect will be given to this *fifth* clause by applying it to the facts of this case; and this may be done without changing a word or a letter, and without any transposition or displacement of any of the clauses, or parts of the section; and without preventing the due application of the *fourth* clause to the facts of cases in which it is applicable, as shown above by supposed cases.

The contrary construction rests entirely upon the assumption that the various clauses and subdivisions of clauses of the section *must* be applied in the successive order in which they are set down. This, surely, is comparatively of small consequence in any point of view, and especially in view of the fact that several of the clauses are merely different provisions for one and the same contingency; and from an apparent necessity, one or the other must be introduced *first*, although a matter of indifference which. The legislative intention is to govern—the *general* intent; the principle or policy governing the enactment; and that being ascertained, the different parts and clauses must be construed, if practicable, consistently with such ascertained general intent.

Here, the general intent in regard to estates in lands of which an intestate died seized, the title to which came to him by devise, descent, or deed of gift, from an ancestor, is, that if the *intestate* leave no child, or brother or sister, or their legal representatives, the estate shall pass to such of the legal representatives of the *intestate*, according to the statutory canons of descent, as are of the blood of the ancestor from whom the estate came; and surely the general intent in regard to the order of succession amongst those who shall take by reason of their being of the blood of the ancestor,

must be taken to be according to the same statutory canons of descent. No arbitrary departure from this obvious general intent can be recognized, unless required by very express and rigorous language. We find none such here—nothing but the successive order in which the clauses are inserted, which violates the general intent, in the particular insisted upon in behalf of the defendants, precisely in the same degree that the children of an intestate are held, according to the rules of descent, to be preferred to his brothers and sisters in the distribution of his property.

Now, giving to the construction insisted upon for the defendants all due consideration, how far is it, upon authority, admissible to be departed from, to reach by construction the general intent of the law? We prefer to refer to the rules of construction recognized and applied by the Supreme Court of Ohio, as the case arises under an Ohio statute; but the principles applied by that court, it will be found by reference to the cases cited by us, are predicated upon the doctrine of like tribunals of other jurisdictions.

In the case *The State ex rel, Comm'rs of Ross Co.* v. *The Z. & M. R. R. Co.*, 16 Ohio St. Rep., 308, the court in construing an act of the Legislature so as to make it conform to the legislative intent, held that a clause in these words, "*and with the assent of the commissioners of the county in which the road relinquished may lie,*" which were included in the *second* section of the act, should be read as if included in the *first* section, and as qualifying the provisions of that section. In the opinion of the court, such a transposition was necessary to effectuate the intention of the law.

In the case *Fosdick* v. *Perrysburg*, 14 Ohio St. R., 472, the act of the Legislature in question was construed to take effect as of a date *preceding* its passage, and directly contrary to its express terms, calling for its taking effect on a future day after the date of its passage, the court being of the opinion that the preceding day and not the future day was meant.

In the case *Slater* v. *Cave*, 3 Ohio St. R., 80, which involved a question under the saving clause of the statute of limitations, in these words: "That if any person entitled to any other action (than ejectment) shall at the time the cause of action accrued, be *within the age of twenty-one years*, &c., such

person shall be at liberty to bring such action within the time limited *after such disability shall be removed.*"

A subsequent law fixed the age of majority of females at 18 years. The court held that the disability of a female under the statute of limitations, ceased at the age of 18 years, after the passage of the act fixing the age of majority of females. That after the passage of that act the saving clause was to be construed in reference to the subject-matter as if the language were "within the age of *majority*," that being the legislative intent. In the opinion delivered in the case, the court declare this rule: "In the interpretation of a statute, the manifest reason and intention of the law should prevail, although at variance with the literal import of the language employed."

In *Burgett* v. *Burgett*, 1 O. R., 469–479–480, it was said by the court: "It frequently becomes the duty of the court, in order to give effect to the manifest intention of a statute, to restrain or qualify, or enlarge the ordinary meaning of the words that are used. The intention of the law makers may be collected from the cause, or necessity of the act; and statutes are sometimes construed contrary to the literal meaning of the words. It has been decided that a thing within the *letter*, was *not* within the *statute*, unless within its intention."

See also 10 O. R., 513–515; 15 O. R., 338–341.

In *Tracy* v. *Card*, 2 Ohio St. R., 431, it is said: "While, on the other hand, the judiciary should be careful not to make its office of expounding statutes, a cloak for the exercise of legislative power, on the other hand, it is equally bound not to stick in the mere letter of a law, but rather to seek for its reason and spirit in the mischief that required a remedy, *and the general scope* of the legislation designed to effect it."

See also Sedgwick on statute and constitutional law, 259, 371, 312.

If the argument we have submitted be holden untenable, it will be only because of a supposed conflict between the *fourth* and *fifth* clauses. We have shown that the facts of the case are precisely fitted to the terms of the *fifth* clause, and by force of that clause, abstractly considered, carried the remainder in fee, on the death of the child *Mary Jane*, to her aunts, the daughters of the testator, as her heirs at law.

Now if this result is in any way doubtful, it can only be because the *first* part of the *fourth* clause conflicts with the *fifth* clause, and seems to admit of being so applied as to sustain the claim asserted by the defendants, that the brothers and sisters of the testator, and not his daughters, were the heirs at law of said *Mary Jane.*

Admitting that there is such conflict between these provisions (which, for reasons given above, we do not concede), how are they to be construed? Which shall be sustained, and which give place to the other?

The rule applicable to the construction of conflicting statutory provisions, is settled and conclusive, that the last in order of time, or in the order of their being set down in the enactment, must take effect. A statute is the expression of the legislative will, and if it contain conflicting provisions, the rule, both of reason and necessity, is the same as in the familiar case of conflicting provisions in a will.

In the case of *The Attorney General* vs. *The Governor and Company of Chelsea Waterworks* (Fitzgibbon's Rep. 195, 4 Geo. II.), it was held by the barons of the Exchequer, "That when the proviso of an act of Parliament was directly repugnant to the purview of it, the proviso should stand, and be held a repeal of the purview, *because it speaks the last intention of the law-giver.*"

Townsend vs. *Brown*, 4 Zabriski's Rep. 80: "It was compared to a will, in which the latter part, if inconsistent with the former, suspends and revokes it."

1st Kent's Com. 522, top, 463, margin, 10th edition.

In *Ham* vs. *The State*, &c. 7 Backfd. (Indiana) Rep. 314, giving a construction to conflicting enactments contained in the same legislative revision, the court said: "The statutes being inconsistent, they cannot stand together; and in determining which is the law of the land, we know of no other rule of construction, than that the last will of the legislature must prevail."

In *Doe* vs. *Leicester*, 2 Taunt. 109, LORD MANSFIELD, C.J., said: "The general rule is, that if there be a repugnancy, the *first* words in a *deed*, and the *last* words in a *will*, shall prevail."

H. H. HUNTER,
Of Counsel for Plaintiff.

Supreme Court of the United States.

DECEMBER TERM, 1867.

John Doe, Ex. Dem. John A. Poor, et al.

versus

Patrick Considine, et als.

Early Opinions upon the Title in Question.

STATEMENT OF FACTS AND MRS. BIGELOW'S DEPOSITION.

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CIRCUIT COURT OF THE UNITED STATES.

SOUTHERN DISTRICT OF OHIO.

JOHN DOE, *ex dem.* JOHN A. POOR AND MARGARET R. POOR, HIS WIFE, *plaintiff*,

against

PATRICK CONSIDINE, EPHRAIM MORGAN, JOHN YOUNG AND CAROLINE YOUNG, HIS WIFE, E. HENRY CARTER, JOSEPH B. HUBBARD AND REBECCA A. HUBBARD, HIS WIFE, JOHN B. PURCELL, AND STEPHEN S. BOYLE, *defendants*.

The land in controversy is the north-east quarter of section thirty-six, fourth township, and first fractional range of the Miami Purchase, in Storrs township, Hamilton County, Ohio, containing one hundred and sixty-one acres and four tenths of an acre.

It was conveyed to William Barr, senior, by deed from John Cross, September 6, 1814. (Records of Hamilton County, Book O., page 359).

William Barr, senior, made his last will and testament, in due form, February 24, 1816. He died on the 15th of May in the same year; and his will was proven and admitted to record, in the Court of Common Pleas of Hamilton County, Ohio, at the next July term. (Record of Wills, Volume 2, page 127).

THE WILL.

In the name of God, Amen! I, William Barr, senior, of

the town of Cincinnati, in the State of Ohio, being old and feeble of body, but of sound and disposing mind, memory, and judgment, praised be God for the same, do make and declare this my last will and testament, in manner and form following, that is to say :

I give and devise unto my sons-in-law, William Barr, James Keys, and John B. Enness, of Cincinnati aforesaid, and to their heirs, all and singular that certain farm, tract or parcel of land, situate, lying, and being in the county of Hamilton, and State of Ohio, which I purchased of John Cross, containing one hundred and sixty acres, to hold the same premises to them and their heirs in trust (first) for the use of my son, John M. Barr, during his natural life ; but, nevertheless, to permit and suffer my son, John M. Barr, to hold, use, occupy, possess, and enjoy the said farm, and to receive and take the rents and profits thereof, during his natural life. And in case my said son, John M. Barr, should die leaving a legitimate child, or children, then, also, in trust for Maria Barr, wife of the said John M. Barr, in case she survive him, during her natural life, for the purpose of maintaining herself and the said child, or children, and educating the said children ; but, nevertheless, to permit and suffer the said Maria Barr, wife of the said John M. Barr, to hold, use, occupy, possess, and enjoy the said farm, and to receive and take the rents and profits thereof, during her natural life. And upon the decease of the said Maria Barr, wife of the said John M. Barr, in case she survive him ; if not, then upon the decease of the said John M. Barr, I do further give and devise the remainder of my estate in said farm unto the legitimate child, or children, of the said John M. Barr, and their heirs forever. If my said son leave but one child, as aforesaid, then I give and devise the said farm to him or her, or his or her heirs forever. But, if he leave two or

more children, then I give and devise the said farm unto such children, and their heirs, to be equally divided between them. But should my said son, John M. Barr, die without leaving any issue of his body, then, and in that case, I do give and devise the remainder of my estate in the said farm unto my said sons-in-law, William Barr, James Keys, and John B. Enness, and their heirs forever.

And if the present wife of my son, John M. Barr, should survive him, he, the said John M. Barr, dying without leaving any legitimate issue, then I direct my said sons-in-law, their executors and administrators, to pay or cause to be paid unto her yearly, and every year, during her widowhood, the sum of two hundred dollars. And if during her widowhood, she should again be lawfully married, then I further direct my said sons-in-law, their heirs, executors, or administrators, to pay or cause to be paid unto her the sum of one thousand dollars, unless the personal estate of my said son, John M. Barr, at his death, should exceed the sum of four hundred dollars; then, whatever the personal estate shall exceed the last mentioned sum shall be taken and deducted from the said sum of one thousand dollars; the said annuity and gift at marriage, or either, to be paid out of my personal estate. And I do hereby further direct my executors, hereinafter named, to finish or cause to be finished, in a plain manner, the house and kitchen at present erected on the farm aforesaid, for the use and occupation of the said John M. Barr, as soon after my decease as is practicable; the said expense to be defrayed out of such parts of my personal estate as are not especially bequeathed. Also, I do hereby empower and direct my executors, hereinafter named, to apply the proceeds of a debt due to me, when collected, by one Joseph McKinny, of the State of Pennsylvania, of two thousand fifty-one dollars and fifty-five cents, and the interest due or to grow

due thereon, as, also, the proceeds of a debt due to me, when collected, by one Frederick Boas, of the State of Pennsylvania, of nine thousand five hundred and thirty-seven dollars fifty-two cents, and the interest due or to grow due thereon, together with proceeds of the sale of my house and lot in the town of Shippensburgh, in the State of Pennsylvania, amounting to the sum of five hundred dollars, or so much thereof as may be necessary, towards the payment in full of the one hundred shares which I have purchased in the Miami Exporting Company Bank of Cincinnati, Ohio. Also, I give and bequeath unto my beloved wife, Mary Barr, the entire income or dividend on the said one hundred shares in the Miami Exporting Company, as well after as before the payments thereon are completed, subject nevertheless and charged with an annuity to our beloved son, John M. Barr, of the sum of fifty dollars yearly, during his natural life; the first sum of fifty dollars to be paid in advance, within three months after my death, and thenceforward, at the expiration of each year from the date of such payment, until his decease. After the decease of my beloved wife, I will and bequeath the dividends of the said one hundred shares to be equally divided between my said sons-in-law, their heirs, executors, and administrators; subject nevertheless to the annuity aforesaid to my son, John M. Barr, in case he survive my said wife. Also, I do further give and bequeath to my beloved wife, Mary Barr, all my household furniture, to be held absolutely as her property. Also, I give and bequeath unto my grandson, William Barr Keys, my gold watch. Also, I do further give, devise, and bequeath the remainder of my estate, both real and personal, to my sons-in-law, William Barr, James Keys, and John B. Enness. Also, I direct my executors to pay my just debts, and all testamentary and other incidental expenses. Also,

I will and appoint the said William Barr, James Keys, and John B. Enness, and the survivor or survivors of them, executors of this my last will and testament; hereby revoking and making void all and every other will or wills at any time heretofore by me made, and I do declare this to be my last will and testament.

In witness whereof, I, the said William Barr, Senior, have hereunto set my hand and seal, this twenty-fourth day of February, in the year of our Lord eighteen hundred and sixteen. WILLIAM BARR. [L. S.]

The attesting witnesses were David Wade, Francis Carr, and David McKnight.

John M. Barr and Maria, his wife, had one child, Mary Jane Barr, born December 27, 1815.

The father (John) died on the 10th of August, 1820; the child (Mary Jane) died on the 27th of November, 1821, being almost six years of age.

During the lifetime of John M. Barr, and at his request, one of the sons-in-law, William Barr, made a lease of the premises to a stranger for a term of years. In 1827, after the death of Mary Jane, and after the marriage of her mother (Maria) to John Bigelow, the tenant in possession, as lessee for years, attorned to them, Bigelow and wife, although he had entered into possession by virtue of a lease from the trustees, sons-in-law, as holders of the legal estate. Those trustees—Barr, Keys, and Enness—proceeded against the tenant for a forcible detainer of the premises; whereupon, by the advice of Charles Hammond, Mr. and Mrs. Bigelow filed a bill in equity to establish her equitable estate, as tenant for life, under the will. That suit was defended by Nathaniel Wright—whose opinion upon the will, given years afterward, is herewith printed—

but the Supreme Court of Ohio decided in favor of the complainants. Bigelow *v.* Barr, 4 Ohio Rep. 358.

William Barr, senior, had four brothers and two sisters; all of whom, except the eldest, died leaving issue.

Ephraim Morgan, under whom the other defendants claim, purchased the life estate of Mrs. Bigelow, and subsequently the interest of all, or nearly all, the children or descendants of the brothers and sisters above mentioned.

The statute of descents in force at the time of William Barr's death, and thence until after the death of Mary Jane Barr, was the act of December 30, 1815, Chase's Statutes, Vol. 2, page 906. The first section of that act declares:

"That when any person shall die intestate, having title to any real estate of inheritance lying and being in this State, *which title shall have come to such intestate by descent, devise, or deed of gift from an ancestor*, such estate shall descend and pass in parcenary to his or her kindred in the following course:

"First. To the children of such intestate, or their legal representatives.

"Second. If there be no children, or their legal representatives, the estate shall pass to the brothers and sisters of the intestate who may be of the blood of the ancestor from whom the estate came, or their legal representatives, whether such brothers and sisters be of the whole or of the half-blood of the intestate.

"Third. If there be no brothers and sisters of the intestate, of the blood of the ancestor from whom the estate came, or their legal representatives, *and if the estate came by deed of gift from an ancestor who may be living*, the estate shall ascend to such ancestor.

"Fourth. If there be neither brother nor sister of the intestate, of the blood of the ancestor from whom the estate came, or their legal representatives, *and if the ancestor from whom the estate came be deceased,* the estate shall pass to the brothers and sisters of the ancestor from whom the estate came, or their legal representatives; and for want of such brothers or sisters, or their legal representatives, to the brothers and sisters of the intestate of the half-blood, or their legal representatives, though such brothers and sisters be not of the blood of the ancestor from whom the estate came.

"Fifth. If there be no brothers or sisters of the intestate, or their legal representatives, the estate shall pass to the next of kin to the intestate of the blood of the ancestor from whom the estate came."

On the 20th of April, 1847, during Mrs. Bigelow's lifetime, Mr. Morgan filed a bill in equity, in the Superior Court of Cincinnati, to quiet his possession; to which only John B. Enness made a defense. He demurred to the bill; but his demurrer was overruled by Judge JOHNSTON, at October term, 1848. The opinion delivered by the Judge, upon that occasion, is herewith printed. Enness then answered the bill, and positively denied that he was *then* setting up any claim, or intended so to do as long as Mrs. Bigelow should live; whereupon Judge HOADLY decided, at October term, 1851, that the complainant could not, in the circumstances, maintain a suit of that description.

On the 29th of June, 1858, Ephraim Morgan and those claiming under him at that time—Mary V. Wood, Patrick Considine, John Young and Caroline, his wife, E. Henry Carter, John B. Purcell, and James T. Morgan—filed their petition, in the Court of Common Pleas of Hamilton County, for the perpetuation of the testimony of Mrs.

Bigelow in answer to certain interrogatories. Her deposition, thus taken and filed by order of the Court, is herewith printed.

Stephen S. Boyle is a purchaser from Mary V. Wood; and Rebecca A. Hubbard, wife of Joseph B. Hubbard, is a purchaser from James T. Morgan.

Many opinions, written and verbal, have been given by counsel, in Cincinnati, respecting William Barr's will. This happened, naturally, from the fact that Mrs. Bigelow lived until the year 1860; and meanwhile the property had appreciated more than a hundred fold. Those opinions have all, or nearly all, agreed:

1. That the estate of John M. Barr was only an estate for his life.

2. That the estate of Maria Barr was an estate for her life, but contingent upon the event of surviving her husband; which contingency happened.

3. That the estate of the child (Mary Jane Barr) was a fee simple, but contingent upon the event of surviving her father; which contingency happened.

4. That the estate intended for the sons-in-law, William Barr, James Keys, and John B. Enness, was a contingent remainder in fee simple; but that the contingency specified —the death of John M. Barr without issue—never happened. Consequently, that they can not be regarded as devisees, and must claim, if at all, as heirs at law of Mary Jane Barr.

5. That Mary Jane being the stock of inheritance, as above stated, the act of December 30, 1815, constitutes the brothers and sisters of William Barr, senior, *as the ancestor from whom the estate came*, or their descendants, the true heirs at law—in exclusion of the sisters of John M. Barr, or their descendants.

Nevertheless, we have thought it decorous to print only the opinions of counsel who are dead, or have long since retired from practice.

OPINION OF JOHN C. WRIGHT, BENJ. TAPPAN WRIGHT, AND TIMOTHY WALKER.

Case.

William Barr, senior, of Hamilton county, Ohio, by will dated 24th February, 1816, and proved in Court in July the same year, devised 160 acres of land to his three sons-in-law, viz. William Barr, James Keys, and John B. Enness, and their heirs in trust:

1. For the use of his son, John M. Barr, to possess, use, and occupy during life.

2. In case the said son died leaving legitimate children, and his wife Maria survived, then for her use during her life, for the maintenance of herself and children, and their education; but, nevertheless, to permit her to occupy and use during life.

3. Upon the said Maria's death, if she survive her husband, or, if not, upon his decease, to his legitimate children in fee simple.

4. In case the said John M. Barr died without issue, then the remainder of said estate to said three trustees, his sons-in-law, in fee—they to pay the widow an annuity, etc.

The testator died in May, 1816. John M. Barr died in August, 1820, leaving his said wife, Maria, and a daughter who died also in November, 1821, intestate and without issue. The widow afterward married John Bigelow, who is since dead. She survives, and is still in possession and enjoyment of the farm.

Upon this state of fact, we are asked who has the legal estate in said land.

Opinion.

The law of descents operating upon the case before us, we understand to be that of 30th December, 1815, which continued in force until February, 1824. (2 Chase's Statutes, 906.)

This estate came to the daughter of John M. Barr by devise from William Barr, senior. She died childless, and without brothers or sisters, or any one representing such, as we understand. The estate then passes, under the fourth condition of the law of descents, in the act referred to, to the brothers and sisters of William Barr, senior, or their legal representatives. In default of such, then to the next of kin of the daughter of John M. Barr, of the blood of William Barr, senior.

Of course, it will be understood the descent will be cast upon the heirs as they stood at the time the daughter of John M. Barr died, viz. November, 1821, subject to Mrs. Bigelow's life estate.

We are not advised whether William Barr, senior, left brothers and sisters or not. WRIGHTS AND WALKER.

CINCINNATI, 26*th July*, 1838.

OPINION OF NATHANIEL WRIGHT.

I have examined the will of William Barr, senior, and the question submitted to me in relation to the title of the 160 acres of land, therein mentioned, purchased of John Cross.

I take the facts to be that J. M. Barr and Maria, his wife, after the death of the testator, had issue one daughter; then, J. M. Barr died; next, that child died. The widow, Maria, still survives, and the question is—who takes the land on the death of that widow?

The language of the will applicable to the case, as it has occurred, is: "On the decease of said Maria, in case she survive said J. M. Barr, I give and devise the remainder of said farm unto the legitimate child or children of said J. M. Barr, and their heirs forever."

By this clause, I am of opinion that the remainder vested in the child, in fee simple absolute, on its birth. The language of the will is positive, and entirely unequivocal—giving it to the child, and its heirs general.

J. M. Barr did not take an estate either in fee simple, or fee tail; for the life estate of his wife intervened between his own estate and that of his child. There is a devise in trust, and the remainder is not to his heirs, but his child.

The child did not take a fee tail; for if such an estate could be under our statute, yet the words of the will are entirely unequivocal, giving the land to the child and its heirs generally, and this is a fee simple absolute. And this corresponds with the general intent of the will; for, after J. M. Barr and his wife, their child is the main object of the testator's bounty. There is no reservation to the child's interest. Had the child lived to mature age, marriage, etc., though she had died without issue, it could hardly be said that the testator did not intend she should have the power to sell and dispose of the land as her own.

It seems to me, therefore, clear that the child took a vested estate in fee simple.

The consequence is that under the law of descents of December 30, 1815, 2 Chase's Stat. 906, section 1, clause 4, the estate passes to the brothers and sisters of the ancestor from whom the estate came, and their legal representatives; that is, to the brothers and sisters of William Barr, senior, and their legal representatives.

If the brothers and sisters of William Barr, senior, are now living, the estate is in them and their assigns. If

they are dead, it is in their heirs at law, or devisees. In order to ascertain who those heirs or devisees are, the history of each branch of the family must be known, and it must be ascertained whether or not they died intestate.

If some of the children of the brothers and sisters of William Barr, senior, are dead intestate, the children of such children would take; if they left no children, then their brothers and sisters.

In the case of Mrs. Grafton, whose children are all dead, if J. M. Barr's child died before her, then the brothers and sisters of Mrs. Grafton and their children would take that share. But if Mrs. Grafton died before the child of J. M. Barr, then her share, on the death of her children, would probably pass to the children of Mrs. Bigelow by her second husband, if any she had; and if not, it would probably pass to Mrs. Bigelow herself.

From this example, it will be seen that the exact person in whom the shares are now vested can not be ascertained without a minute knowledge of the circumstances of each of the brothers and sisters of William Barr, senior, the dates of the deaths, the descendants, intestacy, etc.

CINCINNATI, *Feb.* 22, 1839. N. WRIGHT.

SUPPLEMENTAL OPINION OF NATHANIEL WRIGHT.

A query has been suggested whether, under the 4th clause of the 1st section of the statute of Ohio, of December 30, 1815, on the subject of descents, the brothers and sisters of the ancestor from whom the estate came can take in any case except where the estate came to the intestate by deed of gift; that is, if the estate came by descent or devise, whether said brothers and sisters would

take under that clause. I understand the suggestion to be that, inasmuch as the 3d clause is confined to the case of a deed of gift alone, the 4th clause must also be confined to a deed of gift, and therefore would exclude a descent or devise.

I have re-examined this point, and am still more confirmed in the opinion which I formerly expressed, viz., that this 4th clause applies as well to a devise or descent as to a deed of gift: That is, to apply the principle to the case in question, I am still of opinion that the brothers and sisters of William Barr, senior, the ancestor from whom the estate came, will take the land in question, under the 4th clause, as the heirs of the child of John M. Barr.

Let the language of the whole section be examined. It begins by specifying one class of cases, as distinguished from another class provided for in the subsequent sections. The class provided for in the first section is "when any person shall die intestate, having title to any real estate, etc., which title shall have come to such intestate by descent, devise, or deed of gift from an ancestor." The object of the statute is to distinguish this class from the case of a *purchase* provided for in the subsequent sections. Two distinct courses of descent are specified; one course applicable to one class, and the other to the other. Now, it is most obvious that the course of descent contained in the first section is applicable generally to the class of cases therein specified. The language is positive and unequivocal that in these three cases—"*descent, devise,* or *deed of gift,* the estate shall descend and pass in parcenary, etc., in the following course;" and then the section proceeds to point out that course under the first, second, third, fourth and fifth contingencies.

By natural construction, all these are applicable to the cases put in the beginning of the section, and must necessarily

so apply unless they contain something expressly limiting them; otherwise, there is no force given to the first clause. The third clause does contain an express limitation to a deed of gift; not because the statute intends to make a distinction between that and a devise or descent, but because it mentions a contingency which can only occur in case of a deed of gift. The fourth clause then proceeds, in the order of the other clauses, without any limitation. All these clauses refer directly and necessarily to the first or introductory clause; for the language is, "in the following course." Suppose we ask the question, In what course? The answer is: 1st, thus; 2d, thus; 3d, thus, etc. You can not distinguish one from the other. Even the 3d refers distinctly to the same introductory clause; and therefore it was necessary to specify in it the particular case of a deed of gift. To show more clearly that this is the correct mode of reading the section, suppose this rule of construction be thrown away, and what certainty will there be of the meaning of any of the clauses?

This general reading of the section is enough to settle the question; but there are other particulars still more conclusive. The language of the fourth clause is: "If there be neither brother nor sister, etc., and *if the ancestor from whom the estate came be deceased*, the estate shall pass to the brothers and sisters of the ancestor," etc. Now, observe, this language is positive: "*If the ancestor from whom the estate came be deceased.*" It is not if the estate came by deed of gift, nor any similar language; but it is general, in all cases where the ancestor is deceased. It includes, literally and inevitably, the case of a devise, or descent, as well as a deed of gift; and the two former can not be excluded without a direct violation of the plain language of the statute. An estate coming by devise from a deceased ancestor is as necessarily included in

these terms as the case of a deed of gift. Had the intention been to distinguish them, the language would have been: "*If the estate came by deed of gift from an ancestor who is deceased,*" etc.—a mode of expression easy to adopt, if such had been the intention.

Take this language as it stands: "*If the ancestor from whom the estate came be deceased,*" and apply it to the present case. Is the ancestor, William Barr, senior, from whom the estate came, deceased? That is the only question to be answered under the language used. Can we go further, and inquire whether the estate came from him by devise or deed of gift? Certainly not; for the language applies to all cases where he is deceased.

I do not know that attempts to illustrate this language will add to its perspicuity. My position is simply this: that the language, as used, includes all three of the cases —devise, descent, and deed of gift—and can not, without an utter perversion of the terms, be restricted to any one of them.

Again: the propriety of this construction appears still more evidently from the language of the latter part of the fourth clause. This language is: "If there be no brothers or sisters of the whole blood of the ancestor from whom the estate came, it shall pass to the half-blood, though not of the blood of the ancestor." Now, it is obvious that this part of the fourth clause applies to the same subject as the former part of the same clause; and if the former part is confined to the case of a gift only, this latter part, also, must be so confined; that is, in case of a gift, it passes to the half-blood; but in case of a devise or descent, it is undisposed of. There are several reasons why this reading is inadmissible: 1st, It is incongruous, because the whole clause connects itself grammatically with the beginning of the section, and so includes all the cases there men-

tioned. 2d, It is inconsistent with the general plan of the statute that the half-blood take in case of gift, and be thrown out entirely in case of a devise or descent; for they could not take at all under this section, unless under this particular clause. It is a rule, in construing statutes of descent, that they be made to include all cases; this section, throughout, evidently intends to cover all cases arising under the beginning clause of the section, and no possible reason appears for distinguishing between them. 3d, In the case of Armstrong *v.* Miller, 6 Ohio Rep. 124, the Court say, in so many words, that under this fourth clause, in case of descent, the brothers and sisters of the ancestor from whom the estate came will take the estate. It is true the case was not decided upon that point; but still it was a point made in the case, and one on which the Judge speaks without a particle of doubt.

Again: if the 4th clause is confined to the case of a gift, the 5th clause must be confined in the same way; for the 5th clause takes up the case stated in the 4th, and merely provides for a failure of those entitled to take by the 4th. That is, the 4th provides for the brothers and sisters of the intestate, and the 5th for the failure of such brothers and sisters; and if one applies to a case of a gift only, the other will apply to a case of gift only. The result would be that there is no provision in the law who shall take, in case of descent or devise, where there are no brothers or sisters of the intestate. No part of the whole statute would cover the case; and nobody could take this land by law. This is absurd, and inconsistent with all rules of construction.

The plain, commonsense reading of this statute is too obvious to admit a controversy about its meaning. The section undertakes to provide for descent where the estate

came by devise, descent, or deed of gift. The plan of the section is to specify five classes of cases in which the course of descent is named. The section is arranged in distinction from the following ones, which relate to a purchase: devise, descent, and deed of gift are placed together in opposition to purchase; and to these three, taken together, as one case, the five clauses all refer. Such is the grammatical arrangement, and the obvious meaning. The third clause is applicable only to the case of a gift, and therefore it is so stated; the others are applicable to all three, and obviously so are intended. By following out the opposite construction, in practice, many absurdities might be pointed out; but it seems to me unnecessary.

April, 1842. N. WRIGHT.

OPINION OF JORDAN A. PUGH.

The Legislature seems only to have contemplated the case of devise, etc., from an ancestor to his child, and not to a more remote descendant. In such a case all heirs would be properly graded, and the order in which they would take would be clearly fixed.

But this is a case of a devise to trustees for the life of a child, and for the life of the wife of the child, remainder to the grandchild in fee. The statute of descents of 1815 postpones the right of the children of the ancestor, and the uncles and aunts of the intestate, to that of the brothers and sisters of the ancestor. Such a case does not seem to have been anticipated or foreseen.

The statute bearing upon this subject makes five divisions of the heirs, and gives the property—

1st, To the children of the intestate.

2d, If there be no children or representatives, then to the brothers and sisters of the intestate, of the blood of the ancestor from whom the estate came.

3d, If there be no brothers and sisters of the intestate, of the blood of the ancestor from whom the estate came; and if the estate came by deed of gift, to such ancestor, if he be living.

4th, If the ancestor from whom the estate came be deceased, the estate shall pass to the brothers and sisters of the ancestor; for want of these, to the brothers and sisters of the intestate of the half-blood, and not of the blood of the ancestor.

5th, If there be no brothers and sisters of the intestate, or their legal representatives, the estate shall pass to the next of kin of the intestate of the blood of the ancestor from whom the estate came.

Here are five divisions; each of the last four depending upon a failure of the heirs in the class immediately preceding it. Now, in the case of a devise or deed of gift from an ancestor to his child, the statute would present no difficulty; its construction would be plain and obvious, and the heirs would take in the order of the five divisions: 1st, The children of the intestate; 2d, His brothers and sisters; 3d, The ancestor, if living; 4th, His brothers and sisters; in default of these, the half-brothers and sisters of the intestate, not of the blood of the ancestor; 5th, The next of kin.

They must take in this order; because then all classes of heirs would be provided for, and the order in which they should take would be clearly fixed.

By the very words of these clauses, each is made to depend upon the other; and they can only take effect on the failure of the classes preceding them.

Thus, the heirs of the 5th division can only take upon

a failure of the heirs of the other four classes. This would be the natural and obvious construction of the statute. In the 5th limitation these words are used: "If there be no brothers or sisters of the intestate." And why? Because, in the 2d division, it had provided for the brothers and sisters of the intestate of the blood of the ancestor, and not merely the full-blood brothers of the intestate: In the 4th limitation it had provided for the brothers and sisters of the intestate of the half-blood, and not of the blood of the ancestor. If we use the words of the 5th limitation, "if there be no brothers or sisters of the intestate," in their strict and limited acceptation, then we must exclude a portion of the heirs of the second division—an obvious absurdity.

If, then, we are not to use these words in their strict acceptation, how are we to construe them? By reference to the whole of the preceding clauses, surely. We are to construe them as referring to the brothers of the full-blood, of the half-blood of the blood of the ancestor, and of the half-blood not of the blood of the ancestor.

But it is said the 3d and 4th classes can only take upon a contingency. Thus, the ancestor can only take when he is alive, and when the estate passed from him by deed of of gift; and the right of the heirs of the 4th class depends upon the fact that the estate passed from the ancestor by deed of gift; one limitation is involved in the other, for the words of the 4th limitation are, "in case the ancestor be deceased," and the words would be superfluous if the heirs of the 4th class could take when the property had passed by descent or devise.

Let us look at the 3d limitation. It is in these words: "3d, If there be no brothers and sisters of the intestate, of the blood of the ancestor from whom the estate came, or their legal representatives, and if the estate came by deed

of gift from an ancestor who may be living, the estate shall ascend to such ancestor."

This clause is certainly very inartificially framed. But what does it mean, and what was the object of the Legislature in enacting it? *The ancestor could only have been alive to take when the estate had passed from him by deed of gift.* For this clause of the statute only regulates the descent of property which has come to an intestate by descent, devise, or deed of gift; and both of the other modes of acquiring property presuppose the death of the ancestor. The Legislature could, therefore, only give the property to the ancestor when it had passed from him by deed of gift, and when he was alive; and in the only possible case when he could be alive to take, it gave the property to him. He was obviously entitled to it; it had passed from him without any valuable consideration; he had given it to his children for their use and benefit; he was now disappointed in the objects of that gift; his intent was not fulfilled. A contingency had happened which he did not contemplate—which he could not have contemplated—when he gave the deed to his child; and it was just and equitable that the property should revert to him in preference to collaterals—in preference to his brothers and sisters. But the right of the heirs of the 4th class depends upon no such condition. Their capacity and power to take does not necessarily presuppose a deed of gift, as does the ancestor's. They could take as well when the property passed to the intestate by descent or devise, as when it passed by deed of gift. Why, then, should we limit their capacity to take to the case of a deed of gift? Why should we suppose that the Legislature postponed the children of the ancestor, the aunts and uncles of the intestate, to the brothers and sisters of the ancestor—the

grand-aunts and uncles of the intestate—in the case of a deed of gift?

Is it not the only reasonable supposition to suppose that the Legislature, in enacting this law, contemplated only the case of a devise, etc., from an ancestor to his child, and that the case of a devise to a more remote descendant was not thought of? But why does the Legislature use the language—"If the ancestor from whom the estate came be deceased?" Because it could use no other without much paraphrase and circumlocution. The Legislature wished to save the ancestor's right when he could take. He could only take when alive. The expression, therefore, only means—when that contingency upon which the ancestor shall be entitled to take does not happen, then we give the property to the other heirs. The third limitation might be stated in this form: "If there be no brothers or sisters of the intestate, of the blood of the ancestor, the estate shall ascend to such ancestor, if he be alive." This would have precisely the same legal effect; it is but a more condensed mode of stating the same proposition. Because the ancestor never could be alive unless the estate had passed from him by deed of gift. It is obvious that the words "deed of gift" might be omitted without impairing or affecting the operation of the statute in the least. But we could not omit the words "if he be living," because they are the essential, the vital words of the statute. It would be absurd to say, because the ancestor could not be alive to take except when the property had passed by deed of gift, therefore the heirs of the fourth class shall not take unless the property has passed by deed of gift.

Suppose the statute had been worded as above—"to the ancestor if he be alive?" Then the second limitation in its own language: "If he be deceased, then," etc. Here

the question as to whether the right of the heirs of the fourth class, the brothers and sisters of the ancestor, depended upon the fact whether a deed of gift had been given of the property, could not arise for an instant; and, if it could not, then it surely can not be of any force now. Because this mode of expression has precisely the same substance and legal effect as that used in the statute. The heirs of the fourth class can not take where those of the third can; those of the third could only be alive to take when the property had passed by deed of gift. But the heirs of the fourth class could take as well when the property passed in one way as in the other.

The child, in this case, had clearly a vested remainder by the language of the devise: her right only depended upon the contingency of her surviving her father. The words of the devise are: "If the said John M. Barr die *leaving* a child." He left a child, and the estate vested in that child. "And upon the decease of the said Maria Barr, wife of the said John M. Barr, in case she survive him; if not, then upon the decease of the said John M. Barr, I do further give and devise the *the remainder of my estate* in said farm unto the legitimate child or children of the said John M. Barr, and their heirs forever. *If my said son leave but one child, as aforesaid, then I give and devise the said farm to him, or her, or his or her heirs forever.*" The only requisite contingency has happened. John M. Barr left a child; the estate vested in such child; and there was no other contingency to divest it.

JORDAN A. PUGH.

OPINION OF JUDGE JOHNSTON.

SUPERIOR COURT OF CINCINNATI,
October Term, 1848.

EPHRAIM MORGAN
v.
JOHN B. ENNESS *et al.* } *In Chancery.*

This is a bill filed by the complainant who claims by the will of William Barr, senior, and by virtue of certain conveyances, to be the holder of the remainder in fee simple, and also of the equitable life estate of Maria Bigelow, formerly Maria Barr, to a certain tract of land.

He seeks, by this bill, three objects: First, a construction of the will of William Barr, senior, that shall be binding on all the parties; secondly, a conveyance from the defendants, who hold it in trust, of the legal title of Maria Bigelow's life estate; and thirdly, to be quieted in his title to the fee simple.

In coming at a construction of the last will and testament of William Barr, senior, one is led to the conjecture that his son, John M. Barr, was a weak or thriftless man. Be this as it may, we see that while he provided, with parental solicitude, both for him and his family, he did not choose to give him the control of the property set apart for them. The portion designated for John and his family he devised to his three sons-in-law, John B. Enness, William Barr, junior, and James Keys, in trust, to be disposed of as follows:

First, That John M. Barr should use and occupy it during his natural life.

Second, That if John M. Barr should die, leaving a legitimate child or children, of his wife Maria, then Maria

Barr should use and occupy it during her natural life, for the maintenance of herself and children.

Third, That at the death of John M. Barr, or of Maria Barr, whoever should be the survivor, the legitimate child or children of John M. Barr should take the remainder to them and their heirs forever.

Fourth, That if John M. Barr should die without leaving any issue of his body, then William Barr, junior, James Keys, and John B. Enness, the trustees, should take the remainder to them and their heirs forever.

Fifth, That if John M. Barr should die without leaving any legitimate issue of his body, and his wife Maria should survive him, then the trustees should pay her, out of the personal estate of the testator, two hundred dollars a year during her widowhood.

Sixth, That if Maria, being thus left both husbandless and childless, should lawfully marry again, then the trustees should pay her, out of the testator's personal estate, one thousand dollars, unless her first husband's personal estate should exceed four hundred dollars; and, in that case, just so much less than one thousand dollars as would bring his estate up to one thousand four hundred dollars.

Whether this one thousand dollars was to be in lieu of her annuity, or to be added to it as a premium for marrying again, is not material to inquire. But that she did marry again is a fact in the case—one which, at one time, was supposed to be fatal to her interest in this farm. But the Supreme Court very properly decreed her (4 Ohio R. 358) her life interest in this farm, on the ground that she had brought her first husband a daughter, who was living at his death, though she followed him in about a year after.

Ephraim Morgan purchased this life estate from Maria, since the death of her second husband; and, under this

title, went into possession of the farm. Since then he has placed himself in the shoes of Mary Jane Barr, the infant daughter of John M. Barr, by purchasing in, from time to time, the interests of the brothers and sisters of the testator—who, by the law of descents, as it was at the death of this infant, were her heirs—to all that she had in this farm.

It remains to be seen whether she had any estate, and, if so, what it was. If a remainder, whether it vested before her death, or whether it remained contingent, and expired with her.

At first, it was but a contingent remainder, because it depended on two dubious events: first, that she should be born; and, second, that she should outlive her father—neither of which had happened when the will was made. The moment these two events transpired, her remainder vested. It now depends on a single event—the death of her mother. This event, by the laws of nature, is neither dubious nor contingent.

Sir William Blackstone illustrates the change of contingent to vested remainders as if he had had this infant's case before him. He says:

"First, they may be limited to a dubious and uncertain person; as, if A. be tenant for life, with remainder to B.'s eldest son, then unborn, in tail: this is a contingent remainder. First, it is uncertain whether B. will have a son or no; but the instant a son is born, the remainder is no longer contingent, but vested."

The only difference is that, in this case, there was the additional contingency of the child outliving the father; and, on the occurrence of both these events, by the same rule, this child's remainder, at first contingent, changed to a vested one the instant her father died. The Supreme Court of Ohio, in construing this will for another purpose,

have said that the testator's intention to confer a vested remainder, in fee simple, on the surviving child of John M. Barr was beyond all doubt. And so it seems to me. But it may be said that this is merely an *obiter dictum* of the Supreme Court. Perhaps it is. Perhaps they might have decided all they were then called on to decide without making this remark. But it can do no harm to inquire what the Supreme Court were about when they made this remark. They were about deciding whether the survivorship of this child entitled its mother to her life interest in this farm, or whether, on the ground of failure of issue on the part of John M. Barr, she would have to fall back upon the barren widow's annuity of two hundred dollars, or the re-marrying widow's dowry of one thousand dollars, or both, and let the defendants take the fee. The question whether John M. Barr died, leaving issue, was before the Supreme Court; and Maria Bigelow's right to her life estate depended upon this fact.

Now, this very contingency—that Mary Jane Barr should survive her father—is, by the terms of the will, made the pivot on which two estates, utterly inconsistent with each other, should turn—the life estate of Maria in the one scale, and the fee simple of these defendants in the other. The same principle that gives the life estate to Maria gives a vested remainder in fee simple to her child. The same principle which gives Maria her annuity, only, gives the fee simple, without any intermediate estate, to these defendants. The same contingency which gives the fee to these defendants takes away the life interest of Maria, and gives her her annuity, or, in the event of a second marriage, one thousand dollars. And the testator, with these contingent events and conflicting claims before his eyes, significantly points out the fund from which this annuity of two hundred dollars, or bonus of one thousand

dollars, shall be paid. He does not make it a charge on the land—which, in that event, would have gone to these defendants—but orders it to be paid out of his personal estate. The Supreme Court decided that the necessary event did not transpire to strip Maria Bigelow of her life estate; and, on the same principle, I hold the necessary event has not transpired to clothe these defendants with the fee simple.

But let us turn, for a moment, to the claim of these defendants. They had once a contingent remainder in this farm; let us see if it ever became a vested one. A vested remainder is defined to be "one by which a present interest passes to the party, though to be enjoyed in future, and by which the estate is *invariably* to remain to a *determinate* person, after the particular estate is spent." It is an estate not subject to be defeated by contingencies. Is the estate of these defendants such an one? Is it an estate to remain *invariably* to a *determinate* person after the particular estate of Mrs. Bigelow is spent? So far from it, that their estate is made to depend upon the event of John M. Barr dying without leaving any issue of his body—a contingency which, at the time of the testator's death, might or might not happen. It comes clearly within the definition of a contingent remainder. It is an estate to take effect upon a dubious and uncertain event. The event on which it was to take effect has failed, and the estate failed with it.

There was not only a vested remainder in this child at the instant of her father's death, but there is no estate after it, and no room for any. Every brother or sister whom, by any possibility, she might have had, was provided for in the will. The devise is to the child, or children, of John M. Barr—any number of whom he might lawfully be the father at his death. There is, therefore, no

necessity for creating, by construction, an estate tail in John M. Barr for the benefit of other heirs, or of wresting this will from the natural and obvious meaning of its own words. It creates in John M. Barr, for his life, and in Maria Barr, for her life, if she survives him, an equitable estate on certain contingencies, which have resulted in her favor, and a contingent remainder in the unborn daughter of John and Maria, and in these defendants. The contingencies on which this remainder depended have resulted in favor of the infant daughter. Her remainder is vested and complete.

If this daughter had stood before us, the survivor of her mother, her title would not be more complete than it was the hour after her father's death. And if she, too, were dead, and had left behind her a family of children, the lawful heirs of her body, their title would be no better than Ephraim Morgan's.

This may give you an idea of the construction I put upon this will.

The next object sought by the bill is a conveyance by the trustees of the legal estate of Maria Bigelow. All the beneficial objects of this trust have been accomplished. The first *cestui qui trust* is deceased, and his interest has expired. The second one has sold out her interest to this complainant. The trust never extended beyond these life estates; so that it may now be said to be emphatically dry. There is, then, no reason for beclouding the complainant's title with it, and it ought to be conveyed.

The third object of the bill is not, I suppose, as defendant's counsel suppose, to quiet the title of Mrs. Bigelow at the same time it is decreed to be conveyed, but to quiet the title which he holds under the heirs-at-law of Mary Jane Barr. At first, I was of opinion this could not be done, because the complainant was in possession, under

Mrs. Bigelow's title, and not under the one sought to be quieted. But an examination of the statute has shaken my opinion on that point. All the statute requires is that the complainant shall have the legal title and possession. And when the possession is not wrongful, I do not see why he should be in under the title to be quieted. This is not so clear, however. Be this as it may, there is equity in the bill; and the demurrer must be overruled.

Throughout the foregoing opinions, and particularly those of Nathaniel Wright and Judge Johnston, it was supposed to be the fact that Mary Jane Barr was not *in esse* at the time of her grandfather's death. But now it is proven, by the testimony of Mrs. Bigelow, that Mary Jane was living at that time, and also at the time of the execution of her grandfather's will.

This only adds to the force of the argument contained in the opinions.

DEPOSITION OF MRS. BIGELOW, TAKEN AUGUST 12, 1858, IN PURSUANCE OF CHAPTER V., SECTIONS 363–369, CODE OF CIVIL PROCEDURE OF OHIO.

The deposition of Maria Bigelow, taken pursuant to the annexed order of the Court of Common Pleas, at the office of the undersigned, a Justice of the Peace in Millcreek Township, Hamilton County, Ohio, on the 12th day of August, 1858, between the hours of 8 o'clock A. M. and 6 o'clock P. M., under a petition to perpetuate testimony filed in said Court by Ephraim Morgan and others against John B. Enness and others.

The said Maria Bigelow, being by me first duly cautioned and solemnly sworn, deposed as follows to the interrogatories and cross-interrogatories hereunto annexed. Present—Edmund Pendleton, Esq., attorney on behalf of the petitioners, and Isaac C. Collins, Esq., attorney on behalf of the defendants. FRANKLIN ERNST, J. P.

Question 1st. What is your age?

Answer. I was seventy-one in April last.

Question 2d. Were you or not married to John M. Barr? If yea, state when.

Answer. I was married to John M. Barr in the year eighteen hundred and eleven.

Question 3d. When did your husband, John M. Barr, die?

Answer. He died on the tenth day of August, eighteen hundred and twenty.

Question 4th. Was there any child or children born to you and the said John M. Barr during your said marriage? And if so, how many?

Answer. One child, born in eighteen hundred and fifteen (1815) December 27—a daughter.

Question 5th. When was said child born? And when did it die, if at all?

Answer. I have already answered as to when it was born. She died on the twenty-seventh day of November, eighteen hundred and twenty-one, about six years old.

Question 6th. Please state, if you know, whether William Barr, senior, the father of John M. Barr, deceased, had any brothers and sisters; and, if yea, how many, and what were their names? Please also state, if you know, which of them are dead, and which are living, if any.

Answer. He had three or four brothers, I think. I know he had three—John, Robert, and Samuel— and think

there was one brother, named Andrew, and think he went to Kentucky; but of this am not certain. He had two sisters—one named Jane, who married McWhirter; the other, I think, was named Sarah; married a Grafton, and went to Natchez, Mississippi. I know they are all dead except Mrs. McWhirter, and I think she is dead.

Question 7th. If any of the sisters of William Barr, senior, of Chambersburg, were married, please state to whom they were married, and where they lived.

Answer. I have already stated he had two sisters, and to whom they were married. Mrs. McWhirter lived in Liginier Valley, Pennsylvania. William Barr, senior, lived in Shippensburg, Cumberland County, Pennsylvania: not in Chambersburg.

Question 8th. Please state, if you know, whether any of the brothers and sisters of William Barr, senior, the father of John M. Barr, died leaving children. If so, please state, as fully as you can, how many children each of them left, and the names of such children, as far as you can and know them. If they left daughters, state whether said daughters were married, and if so, to whom.

Answer. The eldest brother, Robert, died leaving no children. The next, John Barr, left seven children; his oldest son Robert, the next William, the next Samuel, the next Andrew, the next John; also two daughters, named Margaret and Mary. I do not know the name of Margaret's husband, but know she had a child named Ellen. Mary married Lindsey, in Columbus, Ohio. Samuel Barr left the following children: William, Mary, Ann, John, and Margaret. Mary married, first, a man named Robinson; then married Thomas Graham; then Craig. Ann married a man named Ellison. Margaret married John F. Keys. Mrs. Grafton left three sons and one daughter; but whether they left any heirs I can not state. The boys, I

am sure, died young. As to the daughter, I am not certain.

Question 9.—Please state, if you know, whether any of the brothers or sisters of William Barr, senior, died without leaving children or other descendants, and, if so, which of them so died ?

Answer—I have already stated that Robert died without leaving any children. He was the only one.

Question 10—Please state, if you know it, what relationship, if any, the following named persons bore to the brothers or sisters of William Barr, senior, of Chambersburg, Pennsylvania, the father of John M. Barr, to-wit: Samuel Barr and Catherine, his wife, Andrew Barr and Mary, his wife, Wilson Lindsey and Rebecca, his wife, of Franklin County, Ohio; John McWhirter and Alison, his wife, of Chambersburg, Pennsylvania ; George Sexton and Rachel, his wife, of Westmoreland County, Pennsylvania; William McDowell and Jane, his wife, Mary Barr, widow, and James McElroy and Susan, his wife, of Westmoreland County, Pennsylvania; Isaac Donaldson and Nancy, his wife, of Mercer County, Pennsylvania; Samuel McWhirter and Margaret, his wife, of Carrol County, Ohio; William Henderson and Sarah, his wife, of Harrison County, Ohio; Betsy J. Barr, of Richland County, Ohio; John Owens and Agnes, his wife, of Richland County, Ohio ; Robert McWhirter, of Greene County, Indiana; Fulton Lindsey and Jane, his wife, and Matthew W. Morehead and Elizabeth, his wife, children of James Lindsey, of Franklin County, Ohio; Thomas Barr, of Fairfield County, Ohio; Martha A. Lindsey, of Franklin County, Ohio; James Lindsey and Ann Elizabeth Lindsey, his wife, and Jane Caroline Lindsey, of Franklin County, Ohio; Mary Craig, of Gallatin County, Kentucky; Ann Ellison, of Adams County, Ohio ?

Answer—I think Samuel Barr, Andrew Barr, and John Barr of Franklin County, Ohio, are sons of John Barr, the brother of William Barr, senior, of Pennsylvania, and I think Wilson Lindsey, of Franklin County, Ohio, is a son of Mary Lindsey, who was a daughter of John Barr. I think John McWhirter, of Chambersburg, Pennsylvania, was a son of Jane McWhirter, sister of William Barr, senior. I know nothing of the relationship of George Sexton and his wife, Rachel. I know nothing of the relationship of William McDowell and Jane, his wife, Mary Barr, widow, and James McElroy and Susan, his wife, of Westmoreland County, Pennsylvania; nor of Isaac Donaldson and Nancy, his wife, of Mercer County, Pennsylvania; nor of Samuel McWhirter and Margaret, his wife, of Carroll County, Ohio; nor of William Henderson and Sarah, his wife, of Harrison County, Ohio; nor of Betsy J. Barr, of Richland County, Ohio; nor of John Owens and Agnes, his wife, of Richland County, Ohio; nor of Robert McWhirter, of Green County, Indiana; nor of Fulton Lindsey and Jane, his wife, and Matthew W. Morehead and Elizabeth, his wife, children of James Lindsey, of Frankln County, Ohio. I do not know, but suppose, that James Lindsey might have been the husband of Mary Lindsey. I know nothing of Thomas Barr, of Fairfield County, Ohio, Martha A. Lindsey, of Franklin County, Ohio, James Lindsey and Anna Elizabeth Lindsey, his wife, and Jane Caroline Lindsey, of Franklin County, Ohio. Mary Craig, of Gallatin County, Kentucky, is a daughter of Samuel Barr, brother of William Barr, senior, of Pennsylvania. Ann Ellison is also a daughter of said Samuel Barr.

CROSS INTERROGATORIES

By I. C. Collins, Esq., who, in the absence of J. W. Herron, Esq., appears as counsel and attorney, in accord-

ance with the order of Court, for Ellen V. Barr, James V. Barr, Alex. F. Barr, children of William V. Barr, deceased, and Mary Barr, a lunatic, and others.

Question 1.—You will please state whether the child to whom you have referred, as the child of John M. Barr and yourself, died before or after the death of her father?

Answer.—She died about fifteen months after the death of her father. M. BIGELOW.

The State of Ohio, Hamilton County, ss.

I, Franklin Ernst, a Justice of the Peace within and for said county aforesaid, do hereby certify that Maria Bigelow, the above deponent, was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, in answer to the interrogatories propounded to her according to the statute, and that her deposition, as above written, was reduced to writing by me in her presence, and subscribed by her in my presence, and was taken at my office, in Mill Creek Township, in Hamilton County, Ohio, on the 12th day of August, 1858, between the hours of 8 o'clock A. M. and 6 o'clock P. M. I further certify that I am not of kin nor attorney to either of the parties, and that said deposition was taken in all respects in accordance with the requirements and provisions of the statute relating to depositions.

In testimony whereof, I have hereunto subscribed my name and affixed my seal.

FRANKLIN ERNST, [L. S.]
Justice of the Peace.

CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF OHIO.

AT THE NOVEMBER TERM, 1865.

PATRICK CONSIDINE, EPHRAIM MORGAN, JOHN YOUNG, AND CAROLINE YOUNG, HIS WIFE, E. HENRY CARTER, JOSEPH B. HUBBARD, AND REBECCA A. HUBBARD, HIS WIFE, IMPLEADED WITH JOHN B. PURCELL AND STEPHEN S. BOYLE.

ads.

JOHN DOE, EX DEM. JOHN A. POOR AND MARGERET R. POOR, HIS WIFE.

OPINION OF THE COURT

BY

MR. JUSTICE SWAYNE.

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ads.

JOHN DOE, EX DEM. JOHN A. POOR, AND MARGERET R. POOR, HIS WIFE.

Mr. JUSTICE SWAYNE said:

This is an action of ejectment—submitted to the Court—without the intervention of a jury.

The facts are agreed by the parties.

William Barr, senior, died on the 15th of May, 1816.

He left a will which was duly admitted to probate in Hamilton county. This controversy has arisen out of that instrument.

The testator left three daughters: Mary, the wife of William Barr; Susan, the wife of John B. Enness; and Mary B., the wife of James Keys. He left also one son, John M. Barr, who, at the time of his father's death, had living, a wife, Maria Barr, and an infant daughter, Mary Jane Barr.

John M. Barr, the son of the testator, died on the 10th of August, 1820.

Mary Jane Barr, the daughter of John M. Barr, died on the 27th of November, 1821. Maria Barr, her mother, died on the 3d of August, 1860. The sons-in-law and daughters of the testator are all dead, each one leaving children born in lawful wedlock.

The testator also left living at the the time or his death four

brothers and two sisters. They are all dead. Two of them left no lineal heirs.

The will contained among others the following provisions:

"I give and devise unto my sons-in-law, William Barr, James Keys, and John B. Enness, of Cincinnati aforesaid, and to their heirs, all and singular, that certain farm, tract or parcel of land, situate, lying, and being in the county of Hamilton, and State of Ohio, which I purchased of John Cross, containing one hundred and sixty acres, to hold the same premises to them and their heirs in trust, (first) for the use of my son, John M. Barr, during his natural life; but, nevertheless, to permit and suffer my son, John M. Barr, to hold, use, occupy, possess, and enjoy the said farm, and to receive and take the rents and profits thereof, during his natural life. And in case my said son, John M. Barr, should die leaving a legitimate child, or children, then, also, in trust for Maria Barr, wife of the said John M. Barr, in case she survive him, during her natural life, for the purpose of maintaining herself and the said child, or children, and educating the said children; but, nevertheless, to permit and suffer the said Maria Barr, wife of the said John M. Barr, to hold, use, occupy, possess, and enjoy the said farm, and to receive and take the rents and profits thereof, during her natural life. And upon the decease of the said Maria Barr, wife of the said John M. Barr, in case she survive him; if not, then upon the decease of the said John M. Barr, I do further give and devise the remainder of my estate in said farm unto the legitimate child, or children, of the said John M. Barr, and their heirs forever. If my said son leave but one child, as aforesaid, then I give and devise the said farm to him or her, or his or her heirs forever. But, if he leave two or more children, then I give and devise the said farm unto such children and their heirs, to be equally divided between them. But should my said son, John M. Barr, die without leaving any issue of his body, then, and in that case, I do give and devise the remainder of my estate in the said farm unto my said sons-in-law, William Barr, James Keys, and John B. Enness, and their heirs forever.

* * * * * *

"Also, I do further give, devise, and bequeath the remainder of my estate, both real and personal to my sons-in-law, William Barr, James Keys, and John B. Enness."

John M. Barr having died, leaving no issue but Mary Jane Barr, and she having died in infancy, unmarried, and the life

estate of her mother, Maria Barr, having terminated by the death of that person, the question is presented, in whom is vested the title to the premises in controversy?

The lessors of the plaintiffs claim title under the three sons-in-law of the testator, or their wives, who were his daughters.

The defendants claim through the heirs of the brothers and sisters of the testator, under the statute of descents of Ohio, of the 30th of December, 1815.

The subject has been argued upon both sides with care, learning, and great ability. The whole field of discussion has been thoroughly enlightened.

I. The questions to be decided lie within a narrow circle. Their solution depends upon the proper application of a few well settled principles of the law of real property.

Lying at the threshold of the subject is the inquiry, as to the extent of the trust estate vested by the will, in the three sons-in-law, of the testator.

The determination of this point is not vital in the case; for whether they took the legal fee or not, and whether the estate of Mary Jane Barr was legal or equitable in its character, the result must be the same.

The same rules of law apply to descents and devises of both classes of estates; and if in this case an equitable fee in remainder was vested in Mary Jane Barr at the time of her death, while the legal fee as a dry trust, was held by the sons-in-law, those holding the latter title could not recover in this action, against parties clothed with the equitable estate, and entitled to the entire beneficial use of the property.

4 Kent's Com. 334, 335. Bridges *v.* Bridges, 3 Vesey, jr., 127. Cholmondeley *v.* Clinton, 2 Jac. & W. 148. Bridges *v.* Duchess of Chandos, 2 Vesey, 417, 426. Walton *v.* Walton, 7 J. C. R. 270. Whites' Lessee, *v.* the City of Cincinnati, 6 Pets. 441.

But as we have views which are satisfactory to ourselves upon the question referred to, and those expressed will simplify the analysis of the case, we deem it proper to give them.

The devise contains words of inheritance. It is to the trustees "*and to their heirs.*" This language, if unqualified by anything else in the clause, would pass the fee. But when we look to the

purposes of the trust and the power and duties of the trustees, we find them limited to two objects:

1. The trustees were to permit John M. Barr to enjoy the premises and receive the rents, issues and profits during his life.

2. If John M. Barr should die, leaving issue, and his wife Maria should survive him, then they were to permit her, during her life, to enjoy the possession and profits of the property.

A drier trust could not have been created. The duties of the trustees were wholly passive. They were authorized to do no act. They were simply to hold the estate committed to them until one or both the events defining the boundary of its exis-ence had occurred.

It was to subsist in any event during the life of John M. Barr, and if he died leaving issue, and his wife survived him, it was to subsist also during her life. The executors were directed in any event, to make an expenditure upon the property, and to take the fund from the personal estate. This duty had no connection with the trust, and its bearing upon the case is in no wise affected by the fact that the executors and trustees happened to be the same persons.

Whether John M. Barr died with or without issue, the entire object of the trust was fulfilled, and its functions were exhausted when the persons for whose benefit it was created ceased to live. "The remainder of the estate in said farm," in the language of the testator, thereupon passed according to the provisions of the will. It is neither expressed nor implied that the trust estate should exist any longer, and no imaginable purpose could be subserved by its longer continuance. When a trust has been created, it is to be held large enough to enable the trustee to accomplish the objects of its creation. If a fee simple estate be necessary, it will be held to exist though no words of limitation be found in the instrument by which the title was passed to the trustee, and the estate created. On the other hand, it is equally well settled that where no intention to the contrary appears, the language used in creating the estate will be limited and restrained to the purposes of its creation. And when they are satisfied, the estate of the trustee ceases to exist and his title becomes extinct. The extent and duration of the estate are measured by the objects of its creation.

JARMAN says: "Trustees take exactly the estate which the purposes of the trust require; and the question is not whether the testator has used words of limitation or expressions adequate to carry an estate of inheritance; but whether the exigencies of the trust demand the fee simple; or can be satisfied by any and what—less estate." 2, Jarman on Wills, 156.

CHANCELLOR KENT says: "The general rule is that a trust estate is not to continue beyond the period required by the purposes of the trust, and notwithstanding the devise to the trustees *and their heirs*, they take only a chattel interest, where the trust does not require an estate of higher quality.'

4. Kent's Com. 233. See also Webster *v.* Cooper, 14 How. 499. Nelson *v.* Langon, *et al.*, 12 How. 110; Doe ex dem. Compere *v.* Hick, 7 Term Rep. 437. Curtis *v.* Price, 12 Vesey, jr. 99. Morant *v.* Gough, 7 B. & C. 206; 1 Greenl. Cruise, 359, note.

This doctrine rests upon a solid foundation of reason and authority, irrespective of the presence or absence of the statute of uses. The consequences in this case, of the absence of such a statute in Ohio, it is therefore not necessary to consider.

We are of opinion that the trust estate of the sons-in law of the testator was only an estate *per auter vie*, and that it terminated at the death of Maria Barr.

II. This brings us to the consideration of the question, what was the estate, in quantity and quality, of Mary Jane Barr, at the time of her decease?

The hinge upon which turns this part of the controversy is the following language of the will:

"And upon the decease of the said Maria Barr, wife of the said John M. Barr, in case she survive him; if not, then upon the decease of the said John M. Barr, I do further give and devise the remainder of my estate in said farm unto the legitimate child, or children, of the said John M. Barr, and their heirs forever. If my said son leave but one child, as aforesaid, then I give and devise the said farm to him or her, or his or her heirs forever. But if he leave two or more children, then I give and devise the said farm unto such children, and their heirs, to be equally divided between them. But should my said son, John M. Barr, die without leaving any issue of his body, then, and in

that case, I do give and devise the remainder of my estate in the said farm unto my said sons-in-law, William Barr, James Keys and John B. Enness, and their heirs forever."

The plaintiffs claim that this clause is an executory devise, and that it gave to Mary Jane Barr a contingent estate, to take effect upon the event of her outliving both her parents, *and not otherwise;* and that as she died before her mother, no title or interest ever vested in her.

The defendants claim that upon the death of the testator, Mary Jane Barr took under the will a vested remainder, subject to open, and let in after-born children, if any there were, and deferred as to the period of enjoyment until death of the one parent who should survive the other, but liable to no other contingency, and limited by no other qualification.

This point of the will must be examined by its own light, and also in the light of the adjudications in like cases.

Considering it without the aid of authority, we have no difficulty in coming to a conclusion as to its proper construction.

We think that it gives: per autre vie Mr Burk /

1. A legal estate *per auter vie*, to three sons-in-law in trust.

2. An equitable life estate, with the usufruct of the property to John M. Barr.

3. In case he should die, leaving issue, and his wife Maria, should survive him, then an equitable estate for life to her with the usufruct of the property, for the benefit of herself, and the surviving child or children of John M. Barr.

4. A vested remainder in fee simple to the child of John M. Barr, living at the time of the death of the testator, subject to open and let in the participation of after-born children, and liable to be divested by their dying before their father, but *not* liable to be defeated by any other event.

(5.) The devise over to the three sons-in-law was an alternate or collateral contingent remainder; and if John M. Barr had died leaving no children surviving him, that remainder would thereupon at once have vested and been converted into an absolute fee simple estate. Luddington *v.* Kime, 1 Lord Ray. 203; Dunwiddie *v.* Read, 3 Searg. & R. 452. (Ch. J. Gibson's opinion.)

In no event, except the death of John M. Barr without issue,

did the will give them any interest in the property, other than the temporary trust estate.

By the vesting of the remainder in Mary Jane Barr, at the death of the testator, and the death of her father, this provision in behalf of the sons-in-law became as if it were not. It was utterly annulled, and could not thereafter take effect, either as a contingent remainder or as an executory devise. We are satisfied the testator did not extend his vision or seek to control this property beyond the period of the death of his son, John M. Barr. With a view to that event, he made two provisions, equally absolute, emphatic and final in their terms. In that respect there is no difference. The result, whether the one or the other should take effect, was to depend upon the single fact whether John M. Barr died with or without surviving children. The testator says:

> "*And upon the decease of the said Maria Barr, wife of the said John M. Barr, in case she survive him; if not, then upon the decease of the said John M. Barr, I do further give and devise the remainder of my estate in said farm unto the legitimate child, or children, of the said John M. Barr, and their heirs forever.* If my said son leave *but one child*, as aforesaid, then I give and devise the said farm to him or her, or *his or her heirs forever*. *But*, if he leave two or more children, then I give and devise the said farm unto such children, *and their heirs*, to be equally divided between them. *But*, should my said son, John M. Barr, die without leaving any issue of his body, then, and in that case, I do give and devise *the remainder of my estate in the said farm* unto my said sons-in-law, William Barr, James Keys and John B. Enness, *and their heirs forever.*"

The language used carried the entire estate of the testator in the premises alike in both cases; and we can no more hold the word "heirs" to be the synonym of "issue," or otherwise qualify the estate intended to be given, in the one case than in the other.

The theory of the counsel for the plaintiff derives no support from the principle of human nature, which not unfrequently impels a testator to transmit his property as far as possible in the line of his descendants. Here Barr, Keys and Enness were not of the blood of the testator. He could not but be aware that if they took the property, it might pass from them, by descent or

purchase, to those who were strangers to his blood, and in no wise connected with his family. He knew it might at any time be

"Grasped by an unlineal hand—
No heir of his succeeding."

Having disposed of the property absolutely at the death of his son, he left the future, beyond that boundary, with its undeveloped phases, whatever they might be, to take care of itself.

III. We will now examine the case in the light of principle and authority.

A vested remainder is where a *present* interest passes to *a certain and definite* person, but to be enjoyed *in future*. There must be a particular estate to support it. The remainder must pass out of the grantor at the creation of the particular estate. It must vest in the grantee, during the continuance of the estate, or *eo instanti* that it determines.

A contingent remainder is where the estate in remainder is limited either to a dubious and uncertain person, or upon the happening of a dubious and uncertain event.

A contingent remainder, if it amount to a freehold, can not be limited on an estate for years, nor any estate less than freehold. A contingent remainder may be defeated by the determination or destruction of the particular estate before the contingency happens. Hence trustees are appointed to preserve such remainders.

An executory devise is such a disposition of real property by will, that no estate vests thereby at the death of the devisor, but only on a future contingency. It differs from a remainder in three material points:

(1.) It needs no particular estate to support it.

(2.) A fee simple or other less estate may be limited by it—after a fee simple.

(3.) A remainder may be limited, if a chattel interest, after a particular estate for life in the same property.

2 Black. Com., chap. 12.

The law will not construe a limitation in a will into an executory devise when it can take effect as a remainder, nor a remainder to be contingent when it can be taken to be vested.

It is a rule of law that estates shall be held to vest at the earliest possible period, unless there be a clear manifestation of the intention of the testator to the contrary.

Johnson *v.* Valentine, 4 Sand. 43; Wrightson *v.* McCauley, 4 M. and W. 240; 37 Penn. 28; 25 Wend. 126; 5 Sim. 40; 21 Conn. 622; Redfield on Wills, 379; 3 Pet. 374; 5 Barr, 28; 4 Pet. 92; 3 Sand. 388; 3 T. R. 765, 766; 15 Pick. 110.

Adverbs of time—As *where*, *there*, *after*, *from*, *etc.*, in a devise of a remainder, are construed to relate merely to the time of the enjoyment of the estate, and not to the time of the vesting in interest.

4 Sandford, 43; 25 Wend, 119; Boraston's Case, 3 Coke, 120; 5 Barr, 506; 8 Iredell, 239.

Where there is a devise to a class of persons to take effect in enjoyment at a future period, the estate vests in the persons as they come *in esse*, subject to open and let in others as they are born afterward.

4 Sandford, 45; 4 J. R. 60; 37 Penn. 28; 8 Adol. & E. 607; 4 Dow, 203; 1 M. & S. 334; 1 New R. 327; 9 Cl. & F. 538; 8 B. & Cress. 235; 5 Barr, 505; 21 Conn. 623.

An estate once vested will not be divested, unless the intent to divest clearly appears.

45 Penn. 232; 5 Vesey, 208; 3 T. R. 493; 9 Ves. 234.

The law does not favor the abeyance of estates, and never allows it to arise by construction or implication.

Com. Dig. Abeyance, A. E. 8, Johns. R. 549; Dormer *v.* Atkins; 3 Atkins, 139.

> "When a remainder is limited to a person *in esse and ascertained*, to take effect by *express limitation*, on the termination of the preceding particular estate, *the remainder is unquestionably vested*." Preston on Estates, 70.

This rule is thus stated with more fullness by the Supreme Court of Massachusetts.

> "Where a remainder is limited to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an event *that must unavoidably happen by the efflux of time*, the remainder vests in interest as soon as the remainder-man is *in esse* and ascertained, provided nothing but his own death before the determination of the particular estate, will prevent such remainder from vesting in possession; yet if the estate is limited over to another in the event of the death of the remainder-man before the determination of the particular estate, his vested estate will be subject to

be divested by that event, and the interest of the substituted remainder man which was before either an executory devise or a contingent remainder, will, if he is *in esse* and ascertained, be immediately converted into a vested remainder." Blanchard *v.* Blanchard, 1 Allen, 227.

In 4th *Kent's Commentaries*, 282, it is said:

"This has now become the settled technical construction of the language and the established English rule of construction." Doe. *v.* Prigg, 8 B. & C. 231. It is added: "It is the uncertainty of *the right* of enjoyment and not the uncertainty of *its actual enjoyment*, which renders a remainder *contingent*. The present capacity of taking effect in possession—if the possession were to become vacant—distinguishes a vested from a contingent remainder, and not the certainty that the possession will ever become vacant while the remainder continues. Williamson *v.* Field, 2 Sandford, Ch. R. 533."

It is further said in the same volume, p. 284:

"A devises to B. for life, remainder to his children, but if he dies without leaving children remainder over, both the remainders are *contingent*, but if B. afterward marries and has a child, the remainder becomes vested in that child, subject to open and let in unborn children, and the remainders over *are gone forever*. The remainder becomes a *vested* remainder in fee in the child as soon as the child is born, and does not wait for the parent's death, and if the child dies in the lifetime of the parent, the vested estate in remainder descends to its heirs."

Doe *v.* Perryn, 3 T. R. 484 (Buller's opinion.) Right *v.* Creber, 5 B. & C. 866. Story, J., in Sisson *v.* Seaberry, 1 Sumner, 243. Hanan *v.* Osborne, 4 Paige, 336. Marsellis *v.* Trathimer, 2d Idem, 35.

We have quoted this language because of its appositeness to the case under consideration. The propositions stated are fully sustained by the authorities referred to.

Other authorities, too numerous to be named, to the same effect, might be cited. We content ourselves with referring to a part of those to which our attention has been called in the briefs in this case.

Harrison *v.* Foreman, 5 Vesey, jr., 208. Belk *v.* Slack, 1 Keen 238. Crowder *v.* Brownfield, 1 New Rep., 325. Danforth

v. Talbot, 7 B. Monroe, 624. Goodtitle *v.* Whitby, 1 Burrows, 235. Moore *v.* Lyons, 25 Wend., 119. Randall v. Doe, 5 Dow, 304. Edwards *v.* Symonds, 6 Taunt., 214. Phipps *v.* Ackers, 9 Clk. & F., 538. Stanley *v.* Stanley, 16 Vesey, 506. Doe *v.* Norvel, 1 Maule & S., 334. Boraston case, 3 Coke, 52. Doe *v.* Ewart, 7 Adolph & E., 636. Minning *v.* Batsdorf, 5 Penn. S. R., 503.

This doctrine has received the sanction of the Supreme Court of Ohio, in Jeffers *v.* Lampson, 10 Ohio State Rep., 101, when it was adopted and applied. The leading authorities relied upon by the counsel for defendants in this case were cited by the Court and controlled the result.

We are bound by this decision as a local rule of property.

The same doctrine has been sanctioned by the Supreme Court of the United States.

Findlay et al. *v.* King's lessee, 3 Pet. 376.

Carver *v.* Jackson, 4 Pet. 1.

Williamson et al. *v.* Berry, 8 How, 495.

In no case, perhaps, has the subject received a more learned and able examination than was given to it by the Vice Chancellor in Williamson *v.* Field, 2 Sand. Chy. R. 533.

We refer particularly to that case, because it is the same case as regards this subject which was before the Supreme Court of the United States, under the name of Williamson et al. *v.* Berry, reported in 8th Howard.

The facts were as follows:

> "Mary Clark devised to Benjamin Moore and Charity his wife, and Elizabeth Maunsel, and their heirs forever, as joint tenants, and not as tenants in common, 'all that part of my said farm at Greenwich aforesaid, called Chelsea,' etc., to have and to hold the said hereby devised premises to the said Benjamin Moore and Charity his wife, and Elizabeth Maunsel, and to the survivors of them, and to the heirs of such survivors as joint tenants, and not as tenants in common—in trust—to receive the rents, issues and profits thereof, and to pay the same to Thomas B. Clarke, etc., during his natural life; and from and after the death of Thomas B. Clarke, in further trust to convey the same in fee to the lawful issue of the said Thomas B. Clarke, living at his death; and if the said Thomas B. Clarke shall not leave any lawful issue at the time of his death, then in the further trust and confidence, to convey

> the said hereby devised premises to my said grandson, Clement C. Moore, and to his heirs, or such person in fee, as he may by will appoint, in case of his death, prior to the death of the said Thomas B. Clarke."

It was held by the Supreme Court, that, under this devise, the first born child of Thomas B. Clarke took a vested estate in remainder, which opened to let in his other children to a like estate, as they were successively born, and the vested remainder became a fee simple estate in the children living at the *death of their father.*

The contrasting analogies between that case and the one under consideration, are too obvious to need to be pointed out. The liability of a vested remainder to be subsequently defeated, in no wise affects its vested character in the mean time. Here, after the death of John M. Barr, leaving issue, there was nothing which could work such a defeat.

See 2 Washb. on R. P. 229, and 1st Greenleaf's Cruise Tit. Remainder.

According to the theory of the plaintiff's counsel, if Mary Jane Barr had married and had died before her mother, leaving children, they would have been cut off from the estate.

Surely the testator could not have intended such a result.

In three of the cases, substantially like this as to the point under consideration, brought to our attention by the counsel for the defendant, this consequence of such a construction was adverted to by the Court.

In Carver *v.* Jackson, 4 Pet., the Court says:

> "It is also the manifest intention of the settlement, that if there is any issue, *or the issue of any issue*, such issue shall take the estate, which can only be by construing the prior limitation in the manner in which it is construed by this Court."

In Goodtitle *v.* Whitby 3 Burrows, 233, Lord Mansfield said:

> "Here, upon the reason of the thing, the infant is the object of the testator's bounty, and the testator does not mean to deprive him of it in any event. Now, suppose that the object of the testator's bounty marries and dies before his age of twenty-one, *leaving children*, could the testator *intend in such an event to disinherit them?* Certainly he could not."

In Doe *v.* Perryne, 3 Term Rep. 595, Buller, Justice, said:

> "But if this were held not to vest till the death of the parents, this inconvenience would follow, that it would not go to grandchildren; for if a child were born who died in the lifetime of his parents, leaving issue, such grandchild could not take, which could not be supposed to be the intention of the devisor."

Mary Jane Barr was, at the death of the testator, within every particular of the category, which, according to the authorities referred to, creates a vested remainder.

1. The person to take was *in esse*.

2. She was ascertained and certain.

3. The estate was limited, to take effect in her absolutely, upon the death of her father.

4. That was an event which must unavoidably happen by the efflux of time.

5. Nothing but her death, before the death of her father, would defeat the remainder limited to her.

6. She had a fixed right of property on the death of the devisor. The period of enjoyment *only* was deferred and uncertain.

7. The term of enjoyment *in possession* depended upon the death of her mother. The right was in no wise dependent on that event.

8. Upon the death of her father, she surviving him, her estate, before *defeasible*, became indefeasible and absolute.

We are thus brought to the conclusion, upon technical as well as untechnical grounds, that Mary Jane Barr had, at the time of her death, an indefeasible estate, the remainder in fee in the premises in controversy.

In the view we have taken of this case, the doctrine of shifting uses can have no application; we therefore forbear to advert to the rules of law relating to that subject.

IV. Mary Jane Barr having died unmarried and intestate, it remains to inquire to whom her estate passed.

The descent cast was governed by the statute of December 30, 1815, before referred to.

The first section only of that statute applies to the subject.

It is as follows:

§ 1. *Be it enacted, etc.*, That when any person shall die intestate, having title to any real estate of inheritance lying and being in this State, which title shall have come to such intestate by descent, devise, or deed of gift from an ancestor, such estate shall descend and pass in parcenary to his or her kindred, in the following course:

1. To tne children of such intestate or their legal representatives.

2. If there be no children, or their legal representatives, the estate shall pass to the brothers and sisters of the intestate, who may be of the blood of the ancestor from whom the estate came, or their legal representatives, whether such brothers and sisters be of the whole or of the half blood of the intestate.

3. If there be no brothers and sisters of the intestate of the blood of the ancestor from whom the estate came, or their legal representatives, and if the estate came by deed of gift from an ancestor who may be living, the estate shall *ascend* to such ancestor.

4. If there be neither brother nor sister of the intestate of the blood of the ancestor from whom the estate came, or their legal representatives, and if the ancestor from whom the estate came be deceased, the estate shall pass to the *brothers and sisters* of the ancestor from whom the estate came, or their legal representatives; and for want of such brothers and sisters, or their legal representatives to the brothers and sisters of the intestate of the half blood, or their legal representatives, though such brothers and sis- be not of the blood of the ancestor from whom the estate came.

5. If there be no brothers or sisters of the intestate, or their legal representatives, the estate shall pass to the next of kin to the intestate of the blood of the ancestor from whom the estate came.

The third category has no application here, and may be laid out of view.

The fourth applies, and gave the property "to the brothers and sisters" of the testator, "or their legal representatives." Armstrong *v.* Miller, 6 O. Rep. 124.

The language of this clause is plain and unambiguous. There is nothing in the context, rightly considered, which qualifies or affects it. There is, we think, no room for construction. We concur entirely in the views of the eminent counsel, whose professional opinions, long since written, have been submitted to us.

It is unnecessary to extend this opinion, already too long, by

going again over the same ground. We think the point hardly admits of discussion. If there could be any doubt on the subject, it is removed by the act of 1835, which substitutes for the rule of descent here under consideration—the one which we are asked to apply. Were we to adopt the consideration claimed by the plaintiff's counsel, instead of adjudicating, we should legislate. That we have no power to do. Our function is to execute the law, not to make it. As the case is presented, we think the defendants are entitled to judgment.

Messrs. Ewing, Hunter and Andrews for plaintiffs; Messrs. Stanberry, Pugh and Lincoln for defendants.

CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF OHIO.

At the Nov. Term, 1865.

PATRICK CONSIDINE, EPHRAIM MORGAN, JOHN YOUNG, AND CAROLINE YOUNG, HIS WIFE, E. HENRY CARTER, JOSEPH B. HUBBARD, AND REBECCA A. HUBBARD, HIS WIFE, IMPLEADED WITH JOHN B. PURCELL AND STEPHEN S. BOYLE,

ads.

JOHN DOE, EX DEM. JOHN A. POOR AND MARGARET R. POOR, HIS WIFE.

ARGUMENT FOR THE DEFENDANTS.

By T. D. LINCOLN,

Of Counsel for Defts.

CIRCUIT COURT OF THE U. S.

SEVENTH CIRCUIT,

DISTRICT OF OHIO.

LESSEE OF M. E. POOR *v.* PATRICK CONSIDINE, JOHN B. PURCELL, ET ALS.	*Ejectment.*

STATEMENT OF FACTS.

The parties plaintiffs and defendants in this case trace their title to William Barr, Senior, who died on the 15th day of May, 1816.

A short time before his death, to-wit, on the 24th of February, 1816, he executed his last will and testament, in due form of law, and which was regularly probated and admitted to record, in Hamilton county, Ohio, in which county the property in question lies.

The principal question in the case arises under the will. But it is important to state some facts bearing upon the same.

William Barr left one son, John M. Barr, and three married daughters, to-wit: Mrs. William Barr, whose husband was a nephew of William Barr, Senior; Mrs. James Keys, and Mrs. John B. Enness. He constituted his three sons-in law his Executors and residuary legatees. John M. Barr, it is claimed, was intemperate, and therefore the trust.

Before his death he had made large advances to his

daughters, and which were regarded by him and by them (as the defendants claim) as their share and fair division of his entire estate. He had sold a large part of his real estate, in Shippensburg, Pennsylvania, amounting to more than twenty-one thousand dollars, about two years before his death, and removed from that place to Ohio about that time. But at the time of his death he had an interest by way of mortgage in a large tract of land in Pennsylvania, and had other real estate there.

It is also a fact which appears that no division or account whatsoever was ever rendered of his money and other personal property in the Probate Court, for the reason, as is believed, that it had, prior to his death, been given by way of advance to his said daughters. The farm in question rented for no more than $150 to $200, (a part payable in improvement on the same,) for more than ten years after Mr. Barr's death, as appears by the leases in evidence.

At the date of this will, and at the death of the testator, his son, John M. Barr, had a daughter, Mary Jane Barr, who was born on the 27th day of December, 1815. John M. Barr died on the 10th day of August, 1820, leaving this grandchild of the testator and Maria Barr his wife, then a young woman, surviving. The grandchild died on the 27th of November, 1821. Its mother, Maria Barr, afterwards married John Bigelow and died in ———— 1860.

John M. Barr and his family resided on this farm until just before his death, when he requested William Barr (one of the sons-in-law) to lease it. He did so, and John M. Barr and his widow received the rents from the tenants until the death of the child, when William Barr claimed the property adversely toMrs. Barr, and denied that she had any interest in it or any further interest under the will, except to the moneyed legacies contained therein.

In 1826 the tenants in possession accepted a lease from Mr. and Mrs. Bigelow and attorned to them.

On the 11th of May, 1827, William Barr commenced a suit before two justices of the peace, for forcible entry and detainer, against these tenants, and obtained a judgment against them. This suit was taken up on *certiorari*, and in the meantime Mr. and Mrs. Bigelow filed a bill, to enjoin the proceedings in the forcible entry and detainer case, claiming a life estate under the will in question. William Barr was enjoined in this suit from further proceeding with his forcible entry and detainer, and the Supreme Court determined that Mrs. Bigelow had a life estate in the farm. This case is found reported in the 4th Ohio Reports, page 538.

It thus appears that these sons-in-law under whom the plaintiffs claim (at least in one aspect of their case) did not consider that they had any active trust under this will for John M. Barr or his wife, and performed none; and it will be admitted by the writer of this brief, that although they greatly mistook their rights under this will, they nevertheless construed it correctly when they considered that no active duties were expected of them as trustees under the same for John M, Barr or his wife.

It is nearly fifty years since this will was written, and it is evident that, as against the family of William Barr, it would be very difficult for these defendants to prove many facts which might be important to them in the construction of this will, and that the plaintiffs being a part of his family, have a great advantage over them in this respect; but it is believed that there can be little or no dispute about the above facts. They are most of them admitted, and the rest of them are as clearly proven as could be expected under the circumstances.

ARGUMENT:

The questions which the case presents are the following:

I. Did Mary Jane Barr take a vested estate in the property under the will of her grandfather, William Barr, Senior, either at his death, or at the death of her father, John M. Barr; or was her estate, under said will, contingent on her surviving her mother, Maria Barr, afterwards Maria Bigelow?

II. If Mary Jane Barr took a vested remainder in this farm, did it divest in favor of the sons-in-law upon her death, by virtue of any provision of said will?

III. If she took a vested remainder in this farm to whom did it pass, upon her death, under the statute of Ohio of December 30, 1815?

IV. Under the last point it is claimed by the plaintiffs: *First.* That it passed to the sons-in-laws, under the will, as the devise to the children of John M. Barr was contingent upon their surviving Maria Barr, their mother; that it never vested, or if it did vest it became divested upon the death of Mary Jane Barr before her mother, and passed, under the special or residuary clause, to the sons-in-law. *Second.* That if vested in Mary Jane Barr, upon her death it descended, under the said statute, to her aunts, the daughters of the testator, under whom the plaintiffs also claim.

The defendants claim that it vested in Mary Jane Barr, and, on her death, passed to the brothers and sisters of the testator, William Barr, Senior, by the clear provision of the statutes of descent of Ohio, passed December 30, 1815.

I am not certain that I entirely comprehend the counsel for the plaintiffs, or that they agree among themselves, but have stated above what I understand them to claim.

FIRST. The case then presents questions relating to the construction of the will of William Barr, Senior.

SECOND. Questions relating to the interpretation and meaning of the act of Ohio, of December 30, 1815. This statute and the will are printed in the appendix, and are marked "A" and "B," and an agreed statement of facts marked "C," with two mortgages, marked D and E.

I.

THE FARM VESTED IN MARY JANE BARR ON THE DEATH OF WILLIAM BARR, SENIOR.

Did Mary Jane Barr take a vested estate, either on on the death of William Barr, Senior, or at the death of her father, John M. Barr; or was her interest contingent upon her surviving her mother?

This question is one depending upon the construction of the will. In construing wills the object is to find out the intention of the testator. That intention is to be gathered mainly from the language of the will itself.

If that be doubtful or equivocal when it is applied to the testator's family and his property, then resort is had to other aids in construing it; and in reference thereto sundry rules have been established and acted upon, all of which favor the position that the remainder vested. Among these rules are the following, to-wit:

First. That the situation of the testator and his family, and other surrounding facts, may be considered in order to place the court in the position of the testator at the time the will was written and at his death. But, as wills must be in writing, and the object is to get at the intention of the testator himself, as it was when he made his will and at his death, it is evident that the only facts and circumstances to be considered are those then in existence and surrounding him.

The object is to place the court in the situation of the testator, in order that the language of the will may be understood as he understood it.

Redfield on Wills, 497.
Worman *v.* Teagarden, 2 Ohio St. R. 382.
Doe *v.* Martin *et al.* 1 Nev. & Man. 524.
Miller *v.* Travers, 8 Bing. 249.
Tucker *v.* Sea. Aid Soc., 7 Met. 206.
Doe *v.* Hisocks, 5 Mees. & Wels. 367.

If subsequent events, which may or may not have been forseen by him, are to be taken into account by the Court in construing this will, it is evident that we are, or may be, making a will for William Barr, and not seeking his intention; we are using our judgment and sense of propriety instead of his, and are inquiring not as to what will he really did make, but what will, in our judgment, he should have made, had he been wise enough to have foreseen the future. The question is not what he should have done, had he foreseen certain circumstances that happened after his death, but what did he in fact do? What does the written will mean?

Fulton *v.* Fulton, 2 Grant R. 31.
Worman *v.* Teagarden, 2 Ohio St. Rep. 382.
Doe *v.* Martin *et al.* 1 Nev. & Man. 524.
Redfield on Wills, p. 496–7.
Doe *v.* Hiscocks, 5 Mees & Wels. 367.
Miller *v.* Travers, 8 Bing. 247.
Tucker *v.* Sea. Aid Soc. 7 Met. 206.

And in applying this rule, much discrimination is required.

In reference to wills of this age, it will be evident, that the Court should be cautious how they admit extraneous facts, to be used in favor of the family of the testator, as against those who are in possession of the property by

purchase. It is plain, that at this day, there can be no equality between the parties, in presenting or proving such facts; that those not connected with the family, would have no means of knowing or proving them, or of rebutting, such as those connected with the family might produce; and therefore, so far, at least, as *they* are concerned, their case must be decided principally upon the face of the will. On the other hand, there is very little danger that those not so connected with this family, could prove any fact, the just weight of which could not be easily ascertained, nor could they keep back any such fact. Any fact, therefore, which is presented by them, that could have any natural bearing upon the construction of the will, and the force of which is not broken by the plaintiffs, is entitled to very considerable weight, much more weight than facts presented by them, and not thus rebutted. But even then, the language of the will is not to be forced.

With these and all other aids that can be brought to bear upon the construction of the will, the question is, nevertheless, what is the fair construction to be put upon the language of this will.

Worman *v.* Teagarden, 2 Ohio St. Rep. 382.
Doe *v.* Martin *et al.* 1 Nev. & Man. 524.
See also Redfield on Wills, p. 496.
Tucker *v.* Sea. Aid Soc. 7 Met. 205.

In *Doe* v. *Martin*, Park Justice says: "I think facts and circumstances relating to the subject of the devise, are admissible: such as possession by the testator, the mode of acquiring, local situation, and the general state of the testator's property. The Court may take such things into consideration, so as to put themselves in the place of the testator, and then see how the terms of the will affect the property. In construing wills, we are only to inquire, *what*

passes under the words of the will? We are to discover what the will itself means, not what the testator intended."

Second. Now, what is the meaning of this will with regard to the interest intended to be given by the testator to his grandchild, Mary Jane Barr? Did he intend that that interest should be a *vested* one, to come into full and absolute possession and enjoyment, after the termination of the life estate, or was it *contingent* upon the child's surviving its mother?

As the child survived its father, John M. Barr, it is entirely immaterial whether the remainder vested at the death of Wm. Barr, Senior, the testator, or upon the death of the father. It is, however, my opinion that it vested upon the death of the testator, and was never contingent.

There is no clear indication or purpose of the will that requires it to be contingent, and upon well recognized principles it vested at the death of the testator. At least, this is my view of the legal meaning of this will. Among the many authorities that bear up this point, see,

Goodtilte *v.* Wilby, 1 Burr, 228.
Wrightson *v.* Macauley, 14 Mees. & Wels. 230.
Doe *v.* Prigg, 8 Barn. & Cress. 235.
Moore *v.* Lyons, 25 Wend. 145, 147.
Williamson *v.* Field, 2 Sandf. Ch. 555.
Right *v.* Creber, 5 Barn. & Cress. 872.
Carver *v.* Jackson, 4 Pets. 91, 92.
Doe *v.* Provost, 4 Johns R. 65.
Broomfield *v.* Crowder, 1 New Rep. 325.
Johnson *v.* Valentine, 4 Sandf. 43.
Edwards *v.* Symonds, 6 Taunt. 214.
Doe *Ex. dem. Dolly v.* Ward, 9 Ad. & El. 607.
Doe *v.* Newell, 1 M. & Sel. 334.
Wimple *v.* Fonda, 2 Johns R. 289.
Brennan Ex. & Tr. *v.* Long, 23 Geo. 216.
Phipps *v.* Acker, 9 Cl. & F. 538.
Phipps *v.* Williams, 5 Sim. 46.
Stanley *v.* Stanley, 16 Ves. 506.

Third. The rules of law relating to wills undoubtedly make the intention of the testator the guide or polar star of construction, and yet in ascertaining that intention the law has most wisely provided that whenever an estate in fee is given by will, whether it be a remainder or an absolute fee, that estate shall be regarded as a vested estate, and not contingent, unless the intention to make it contingent be clearly expressed. See authorities above cited. And the reasons for this rule are quite obvious. The consequences of tying up estates and keeping them contingent are so injurious to the property itself, and to the improvement thereof, that there should be clear proof of intent expressed to make the estate contingent, before it should be determined that the testator designed any such thing. The property is quite likely to suffer waste, can not be incumbered or sold except upon gambling prices, and is not likely to be improved. It is for these, among other reasons, that the courts have repeatedly gone so far against construing estates under will as contingent, making it at times almost against public policy to create contingent estates. This tendency is stronger in this country, and even in Ohio, than in England, for the reason that real estate has more of a commercial character here, and the law does not favor entails or the tying it up for the first son or for any other purpose. *Johnson* v. *Vallentine*, 4 *Sandf. R.* 44. In favor of the clearly expressed intention of the testator, the law however does permit a man by his will to create such an estate within certain narrow and well defined limits. It has, however, wisely construed *any* fair or reasonable doubt upon the subject, in favor of the vesting of the estate, as being more consistent with our policy, with the spirit of improvement so largely infused into our laws and institutions, and to the probable intention of the testa-

tor. For some of the cases in which this rule is illustrated, see

Jeffers *v.* Lampson, 10 Ohio St. 101.
Right *v.* Creber, 5 Barn. and Cress. 872.
Wrightson *v.* Macaulay, 14 Mees and Wels. 231.
Johnson *v.* Vallentine, 4 Sandf. R. 44.
Manning *v.* Batdorf, 5 Barr, 505.
Caver *v.* Jackson, 4 Pets. 91, 92.
Moore *v.* Lyons, 25 Wend. 126.
Chews. Appeal, 37 Penn. 28.
Doe Ex dem Long *v.* Prigg, 8 Barn. and Cress. 240.
Phipps *v.* Ackers, 9 Cl. & Fin. 538.
Stanley *v.* Stanley, 16 Ves. 506.

This principle is so well grounded in reason and in the spirit of our law, and is so often followed by the courts, and has become so familiar to the members of the profession, who draft most of the wills, that it is evident enough that if not followed by the courts they would be very likely to disregard the intention of the testator.

I know it is said that wills are sometimes drawn *in ops consillii*, and that therefore the Court should seek for the intention of the testator, and that for this reason, parol proof is resorted to. It is very well, at times, to consider that the will was drawn when the party was *in extremis* and *inops consillii* (if such appears to have been the case), but the great majority of wills are not drawn when the party is *in extremis*, or *inops consillii*, but are, on the contrary, drawn when the party is in health, by counsel learned in the law, who follow these well established rules; and if these rules were not to be followed by the courts in construing wills, there would be danger of running counter to the intention of the testator. Nor is it for this reason principally, that parol proof is resorted to, but for identically the same reason in which it is resorted to in other cases of written instruments, namely: that when the instrument is applied to the subject matter and the testator's

family, there is at times an ambiguity presented, which, as it is created by parol, may be met and dissipated by parol evidence, or explained by such evidence.

The statute of frauds holds good in the case of wills as well as of any and all other instruments. This rule as to the vesting of the estate has existed so long, and has had such a universal application, both in England and in this country, and wills have so generally been drafted with direct reference to it, and it has so largely permeated the transfer of property by will, and so many titles have been bought and sold resting upon it, that unless controlling influence was given to it, in cases of any fair doubt, the courts would strike down one of the most fundamental rules relating to property and wills.

GENERAL RULES AS TO THE VESTING OF ESTATES.

In the practical application of this rule as to vesting of estates, the courts have established sundry principles, or landmarks, which have been the result of experience; among which may be found the following:

First. Estates are to vest upon the death of the testator, unless it be clearly expressed otherwise.

Moore *v.* Lyons, 25 Wend. 126.
Johnson *v.* Valentine, 4 Sandf. 45.
Chews Appeal, 37 Penn. 28.
Phipps *v.* Williams, 5 Sim. 46.
Redfield on Wills, 379, 380.
Gold *v.* Judson, 21 Conn. 622, 623.

Second. The term survivor, is held to mean those who are such at his death, unless a clear intent be otherwise expressed.

Moore *v.* Lyons, 25 Wend. 127.
Edwards *v.* Symons, 6 Taunt. 214.
Brannen Ex. *v.* Long, 23 Geo. 247.

Third. In favor of children and lineal descendants, the estate vests, at the death of the testator, in such as may then be born, but may open up to let in after born children or issue. This, because that was probably so intended.

Mining *v.* Batdorf, 5 Barr, 505.
Johnson *v.* Valentine, 4 Sandf. 45.
Chew's Appeal, 37 Penn. 28.
Gold *v.* Judson, 21 Conn. 623.

Fourth. Mr. Preston, in his Treatise on Estates, thus lays down a rule upon this point:

> "Now, when a remainder is limited to a person in *esse*, and ascertained, to take effect by words of *express limitation*, on the determination of the preceding particular estate, this remainder is unquestionably vested." *Preston on Estates*, p. 70.

Mary Jane Barr was *in esse* and ascertained, when this will was written, and when it took effect by the death of Wm. Barr, Senior. It is undisputed; and this rule vests the estate in her, at the death of Wm. Barr, Senior.

Fifth. Where a devise is in the present tense, as, "I give and devise;" there the estate vests, unless the contrary intent be clear. *Finlay* v. *King*, 3 Pets. 376.

The words of Wm. Barr, are, "I do further give and devise."

Sixth. The Supreme Court of Mass., thus states a rule:

> "Where a remainder is so limited to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an event that must unavoidably happen by the efflux of time, the remainder vests in interest as soon as the remainder-man is *in esse* and ascertained, provided nothing but his own death before the determination of the particular estate, will prevent such

remainder from vesting in possession; yet if the estate is limited over to another in the event of the death of the remainder-man before the determination of the particular estate, his vested estate will be subject to be divested by that event, and the interest of the substituted remainder-man which was before either an executory devise or a contingent remainder, will, if he is *in esse*, and ascertained, be immediately converted into a vested remainder." *Blanchard* v. *Blanchard*, 1 Allen, 227.

Now, under this rule, is it not certain that Mary Jane Barr took a vested remainder?

She was *in esse* and ascertained, at the time of the writing of the will, and at the death of the testator, and in the direct line of descent favored by the law. Her estate commenced upon the determination of the particular estate, and nothing but her death before the determination of the life estate could prevent her enjoying the same in possession, and the particular estate must unavoidably terminate by the efflux of time.

Mary Jane Barr falls within every word of this rule.

Nor, was this remainder to pass over to another upon the death of Mary Jane Barr, before the determination of the particular estate.

It was limited over only in the event of her death before her father, and not before the determination of the particular estates. Her father died before the particular estates determined.

This same rule, and in the same language, is stated by Mr. Chancellor Walworth, in the case of *Moore* v. *Lyons*, 25 Wend. 144.

It is also stated, in many other cases.

Doe *Ex dem* Long *v.* Prigg, 8 Barn. & Cress. 235.
Johnson *v.* Valentine, 4 Sandf. 43.
Williams *v.* Field, 2 Sandf. Ch. R. 553.
Gold *v.* Judson, 21 Conn. 623.

Seventh. The last rule also holds good where the remainder, instead of being to a party *in esse*, and ascertained, is to a class, as children, nephews, brothers and sisters.

It is thus stated by the Court, in *Johnson* v. *Valentine*, 4 Sandf. 45.

> "It is also well established, that where there is a devise to a class of persons to take effect in enjoyment, at a future period, the estate vests in the persons as they come *in esse*, subject to open and let in others, as they are born afterwards."

This applies to the case before us. Mary Jane Barr was living and evidently the object of the testator's bounty. She was not pointed out by name, but under the term child of John M. Barr, and would take with other children of John M. Barr, as they were born. See also, to the same effect:

Doe *v.* Provost, 4 Johns R. 60.
Chew's Appeal, 37 Penn. 28.
Doty *v.* Ward, 8 Adol. & El. 607.
Randolph *v.* Doe, Ex. dem. Roarke, 5 Dow, 203.
Doe ex dem. Roake *v.* Nowell, 1 M & S. 334.
Bloomfield *v.* Crowder, 1 New R. 327.
Phipps *v.* Ackers, 9 Cl. & T. 538.
Doe Ex. dem. Long *v.* Prigg, 8 Barn. & Cress. 235, 236.
Mining *v.* Batdorf, 5 Barr, 505.
Gold *v.* Judson, 21 Conn. 623.

This rule is thus stated in a late case determined by the Supreme Court of Pennsylvania. *Mining* v. *Batdorf*, 5 Barr, 504.

> "Where land is given to one person for life, or for any other estate upon which a remainder may be dependant, and after the determination of that estate it is devised over, whether to persons *nominatim*, or *to a class of persons*, it will vest in the object to whom the description applies upon the death of the testator.

But in devises to children, where the question has been most frequently agitated—at what period are the objects who are to take to be ascertained?—the rule is different. When there is an *immediate* gift to children those only living at the testator's death will take; but it is now settled that where a particular estate or interest is carved out, with a gift over to the children taking that interest or of any other person, the limitation will embrace not only the object living at the death of the testator, but all who shall subsequently come into existence, before the period of distribution. Such remainder vests in the objects to whom the description applies at the death of the testator, subject to open and let in others answering the description as they are born successively. As to the latter, the remainder is contingent until they are *in esse*, but then it immediately vests, and from thenceforth is attended by all the properties incidental to vested estates." *Mining* v. *Batdorf*, 5 Barr, 504.

This applies directly to the case under consideration. Here were successive life estates given to the father and mother of Mary Jane Barr, (in the latter of which she had an interest,) with remainder to their child or children. The estate vested in Mary J. Barr upon the death of the testator, subject to open up and let in after born brothers and sisters, should she have any.

This same rule is stated in the same language, in a still later case in Pennsylvania. *Chew's Appeal*, 37 Penn. 28, and it is sustained by many other authorities. See also *Gold* v. *Judson*, 21 Conn. 623.

Eighth. A learned author states this as a rule:

"When there is in terms no devise or bequest except on the attainment of a certain age, and the postponement seems merely to arise from the circumstances of the estate, or appears to be for the accomplishment

of some special purpose unconnected with the property or ownership, as for the purpose of paying debts out of the intermediate income, or for the benefit or convenience of some other person, to whom the income or a particular interest is given in the meantime; in such case it is held that there is a suspension of the possession or enjoyment only, and not of the property or ownership, and the interest is vested. *Original View of Executory Interests*, by *Smith*, 164, *Fuller* v *Fuller*, 5 Jones Eq. 226.

Ninth. It is also a well established rule, that estates that are contingent shall be held to vest so soon as they possibly can, upon any fair construction of the will.

In the language of Parke, Baron, in *Wrightson* v. *Macauley*, 14 Mes. & Wels. 230, "We should construe estates to vest at the earliest possible period;" or the language of the court in *Johnson* v. *Valentine*, "If violence is not done to the meaning of the testator, the estate should vest at once."

Johnson *v.* Valentine, 4 Sandf. 46.
Wrightson *v.* Macauley, 5 Barn. & Cress. 872.
Carver *v.* Jackson, 4 Pets. 92.

Tenth. For similar reasons, it is held that an estate shall never be considered an executory devise, when conformably to the rules of law, it may be regarded as a remainder.

Purfoy *v.* Rogers, 3 Sand. 388.
Doe *v.* Morgan, 3 T. R., 765, 766.
Nightingale *v.* Burrill, 15 Pick. 110.

Mr. Ewing maintains that the estate given to the children of John M. Barr by this will is an executory devise, being a fee mounted on the fee previously given to the sons-in-law *in trust*: whereas I maintained that the trustees never took a fee, but had simply a life estate *per autre vie*,

as will appear hereafter. And the estate given to Mary Jane Barr was a clear and well defined vested remainder, in fee.

Eleventh. Adverbs of time, such as on, upon, at, then, when, from and after, and the like, found in wills, denote simply the postponement of the enjoyment, and not the postponement of the ownership or vesting of the estate.

Johnson *v.* Valentine, 4 Sand. R. 43.
Moore *v.* Lyons, 25 Wend. 119.
Boraston's Case, 3 Coke, 120.
Minning *v.* Batdorf, 5 Barr, 506.
Reeves *v.* Frizzle, 8 Iredell, 239.

Twelfth. Courts also lean strongly against construing *provisions* as *conditions*, when the intention of the testator does not require them to do so.

"If violence is not done to the meaning of the testator they prefer that the estate should vest at once."

Johnson *v.* Valentine, 4 Sandf. 46.
Finlay *v.* King, 3 Pets. 374.

Thirteenth. Courts also lean against construing conditions as conditions precedent rather than conditions subsequent, for the former prevents the vesting of the estate.

Finlay *v.* King, 3 Pets. 374.
Branman *v.* Long, 23 Geo. 245.

Fourteenth. It is also a well established rule, growing out of the same general reason, that an estate once vested is not to be divested, but descends to the heirs at law, unless the intent to divest the same clearly appears.

The rule as to the presumption in favor of the vesting of the estate, is well expressed in the case of CROXALL *v.* SHERRARD, 5 Wall, 287, decided at the last term of this Court.

Sturges *v.* Pearson, 4 Mad. Ch. R.
Brownhead *v.* Hurtt, 2 Jac. and Wal. 463.
Sprey *v.* Barnes, 3 Mer. 240.

This rule seems to flow from the same general reasons that favor the vesting of estates.

Fifteenth. It is also a rule often brought into play in the construction of wills, "that the first taker of a legacy is presumed to be the chief object of the testator's bounty."

This rule is stated in *Still* v. *Spear*, 45 Penn. 171.

This rule applies: The first taker of the fee was Mary Jane Barr; the first takers of any interest were her father and mother. The will shows Mary Jane Barr and her father and mother to have been the chief object of the testator's bounty so far as the farm is concerned, and this rule aids this construction of the will.

I have thus far brought forward well recognized principles, long established, to aid in the construction of wills. And under these it is very clear that Mary Jane Barr took a vested fee. She was in the direct line of descent, a grandchild living at the time the will was written and at his death, and the estate is given in the language of the present tense: "I do further give and devise." She was the first taker, and she comes directly within all the rules above stated; and under the general principles of law, well grounded in reason and repeatedly enunciated, this estate vested, unless the intent was plain to the contrary, or unless there were some principles of law which forbid such vesting.

CASES LIKE THAT UNDER CONSIDERATION.

I have not thus far cited any case as analogous upon the facts, and as an authority, because of its similarity to the case before the court, for the reason that general principles are much more satisfactory than particular cases.

As it is stated by the court in *Olney* v. *Hull*, 21 Pick. 315:

> "The construction of wills depends so much upon peculiar expressions used in each, that not much aid can be derived from adjudged cases;" and yet, as the court states in that case, "they may well be referred to for some light. But where they establish general principles of construction, they are of importance."

As Lord Mansfield says, in the case of *Goodtitle* v. *Whitney*, 1 Burr. 233:

> "In the construction of wills, adjudged cases may very properly be argued from, if they establish general rules of construction, to find out the intention of the testator."

See also *Danforth* v. *Talbott*, 7 B. Mon. 625.

There are many cases in which the facts are very much like the facts in the case under consideration. Among them, see the following:

Jeffers *v.* Lampson, 10 Ohio St. R. 104.
Harrison *v.* Foreman, 5 Ves. Jr. 208.
Belk *v.* Slack, 1 Keen Ch. 238.
Crowder *v.* Brownfield, 1 New. R. 325.
Danforth *v.* Talbott, 7 B. Mon. 624.
Goodtitle *v.* Whitney, 1 Burr. 235.
Moore *v.* Lyons, 25 Wend. 119.
Right *v.* Creber, 5 Barn. & Cress. 872.
Randall *v.* Doe, 5 Dow. 204.
Edwards *v.* Symonds, 6 Taunt. 214.
Phipps *v.* Ackers, 9 Cl. & F. 538.
Randolph *v.* Doe *ex dem* Roake, 5 Dow. 204.
Stanley *v.* Stanley, 16 Ves. 506.

I shall not go into these cases very much at large, but

inasmuch as they illustrate the above rules, I will refer to some of them not referred to by my colleagues.

The first of these cases is one from Ohio, *Jeffers* v. *Lampson*, 10 Ohio St. R. 104.

The will in this case, was as follows:

> "I give and bequeath all the rest, and residue of my property to my beloved wife, Joannah Jeffers, during her natural life, including my real, personal and mixed property of every kind whatsoever; *after* the decease of my wife, I give and bequeath all my property real, personal, and mixed, of every kind, to my sons, Wm. and Henry Jeffers, to them and their heirs and assigns forever. It is my will, that if either of my said sons, William or Henry, shall happen to die before my beloved wife, *then* it is my desire that the survivor, at her decease, shall have the whole of my property to him, and his heirs and assigns forever."

One of the sons conveyed his interest before the death of the mother, and the question was under this conveyance. It was claimed that the remainders to the sons, William and Henry, were contingent until the death of their mother. It was a case in which there was very much more ground to claim that the remainders were contingent, than in the case before the court.

But the court held the remainder to be vested from the death of the testator, subject to be divested in favor of the survivor, should either of the sons die before his mother. The court say:

> "We are of opinion, that by this language, a remainder in fee (after the determination of the life estate of the mother), was vested immediately in William and Henry, in equal moieties of the premises in common; such vested remainder, however, being sub-

> ject to be divested, upon the contingency expressed, to-wit: the death of either during the life of the mother."

Was not this a case of much more doubt as to the vesting of this remainder, than that now under consideration?

The estate to the son is given, "after the decease of my wife I give," etc., with the further provision that if either die before the mother, then the whole estate should go to the survivor.

This is one of the last cases in Ohio, and shows how strongly her courts lean toward the vesting of such estates.

Harrison v. *Foreman*, presents the following case:

> "John Stallard, by his will authorized his trustees to invest his property in annuities, and gave £40 per annum arising therefrom, to Jos. Irving and John Harrison, *in trust*, to Mrs. Sarah Barnes, during her life, and from and after her decease * * * to Peter Stallard and Susannah Snell Stallard, children of his (the testator's) cousin William Stallard, in equal moieties, and in case of the decease of either of them, in the lifetime of Sarah Barnes, then he gave the whole thereof to the survivor of them living at her decease. He gave all the residue of his estate, and effects of every kind, to Elizabeth Stallard and Sarah Stallard, the children of his cousin, Abraham Stallard."

Susannah Snell Stallard and Peter Stallard, died before Sarah Barnes. The defendant, Foreman, claimed the £40 per annum, as executor of Susannah Snell Stallard and Peter Stallard, and plaintiff, Harrison, claimed it for the residuary legatees; and the question was, whether the bequest was, by these means, put an end to, and become absolutely void, whereby it went to the residuary legatees.

Sir Richard Pepper Arden, in deciding the case, says:

"Upon the first part of the will, if it stood without the condition annexed, in case of the death of either of them in the lifetime of Sarah Barnes, there could be no doubt, I suppose, that it would have been vested in these two persons: for it is a bequest of these annuities to a person during her life; and after her decease, to two given persons in equal moieties. If it rested upon these words, there could be no doubt it would, upon the death of that person, have been a vested interest in them as tenants in common, transmissible to their representatives, whether they survived the person entitled for life, or died before her. Then comes the condition annexed, making a disposition in a given event, different from that which would have been the effect of the first words. The contingency described in that part of the will, never took place; there being no survivor of those two persons at that time. The question is, then, whether this makes the whole void, as if it never vested at all. It is perfectly clear, that where there are clear words of gift, giving a vested interest to parties, the court will never permit that absolute gift to be defeated, unless it is perfectly clear, that the very case has happened, in which it is declared, that interest shall not arise." 5 Ves. 208. 209

This is directly in point. There was but one contingency expressed in Wm. Barr's will, in which the sons-in-law were to have this remainder. "But should my son, John M. Barr, die without leaving issue, *then* and in *that case*, I give and devise the remainder of my estate in the said farm to my sons-in-law."

Now, this contingency never happened. It is the only event expressed, in which they were to take the remainder. "*Expressio unius est exclusio alterius.*"

The words creating this remainder in Mary Jane Barr, are in the present tense, and confer a present interest, "I do further give and devise the remainder," etc.

The estate, therefore, which vested in Mary Jane Barr, did not divest, nor did it become a lapsed legacy, but descended, upon her death, to those entitled to the same, under the statute of descents of Ohio. In the case of *Foreman* v. *Harrison*, it will be noticed that the estate was in trustees, until after the death of the two remaindermen, in whom the estate vested.

For similar cases, showing that estates once vested, never divest, unless where the case for divesting is clear, and the precise case happens, *see also*,

Smithers *v.* Willock, 9 Ves. 234.
Sturges *v.* Pearson, 4 Mad. Ch. R. 413.
Brownhead *v.* Hirst, 2 Jac. & Wal. 463.
Sprey *v.* Barnes, 3 Merivale, 240.

The case of *Belk* v. *Slack*, 1 Keen, 238, presents the following facts:

> William Belk, by his will, dated in 1799, gave the residue of his real and personal estate to trustees upon trust, to pay the interest and produce thereof to his mother during her life; and after the decease of his mother and daughter, he devised and bequeathed the same to his brother George Belk, and his sister Hannah Belk, to be equally divided between, or to the survivor or survivors of them. The testator died shortly after the date of his will, leaving his mother, his daughter Sarah Slack, his brother George Belk, and his sister Hannah Belk, surviving him. George Belk died in 1820, and Hannah Belk survived the testator, but had not been heard from for thirty years. Sarah Slack, the testator's daughter, and sole next of kin, survived the testators.

The suit was brought by the personal representatives of George Belk, against the personal representatives of Sarah Slack. It was claimed that George Belk's interest de-

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The suit was brought by the personal representatives of George Belk, against the personal representatives of Sarah Slack. It was claimed that George Belk's interest de-

pended upon his surviving the mother and daughter, and did not vest. But it was held to have vested, and complainants recovered.

In the case of *Bowman's Executors and Trustee* v. *Long*, 23 Geo. 245, the question was presented upon the following clause of a will:

> "I give and bequeath to my grandson, William Henry Long, only surviving child of my late daughter, Lucy Long, the property which I gave to Lucy A. Long and her children, in my will above referred to, *should he live to be twenty-one years of age; but should my said grandson die before he arrives at twenty-one years of age, then said property I give to my other lawful heirs.*"

The court, after stating that there were no technical words which would determine whether the condition was precedent or subsequent, and that the intention of the testator must govern, nevertheless held that the property vested in the grandson, subject to be divested in case he did not live to be twenty-one years of age.

In the case of *Randall et al.* v. *Doe on the demise of Roake*, 5 Dow. 204, determined in the House of Lords, this question was presented under the following will:

> "I give and devise all my freehold estates in the city of London and county of Surrey, or elsewhere, to my nephew, John Roake, for his life. * * * And on the decease of my said nephew, John Roake, I devise all my estates * * * to and among his children lawfully begotten, equally, at the age of twenty-one, and their heirs as tenants in common. But if only one child shall live to attain such age, to him, or her, or his or her heirs, at his or her age of twenty-one. And in case my said nephew shall die without lawful issue, or such lawful issue shall die be-

> fore twenty-one, then I devise all the said estates * * * to and among my said nephews and nieces, Miles, Thomas, John, James and Sarah Panfold, and Susannah Layman, or such of them as shall be then living, and their heirs and assigns forever."

It was held in the King's Bench that the children of John Roake took vested remainders.

This case presented facts very much like the case under consideration. The terms of the will are very similar in the cases: the very expression so much relied on by the counsel for the plaintiffs, "*and on the decease,*" was used in this case.

The syllabus of the case of *Brownfield* v. *Crowder*, 1 New R. 325, is thus stated by the reporter:

> "Testator devised to 'A' for life, and after her death, to 'B' for life, and at the decease of A and B, or the survivor, gave all his real estate to 'C,' if he should live to attain twenty-one; but in case he should die before that age, and 'D' should survive him, in that case to 'D,' if he should live to attain twenty-one, but not otherwise; but in case both 'C' and 'D' should die before either of them should attain twenty-one, then to E in fee.
> Held, that 'C' took a vested remainder."

The controversy was between C and the heir at law, and the above is a fair statement of the case.

Edwards v. *Symonds*, 6 Taunt. 214, presented the question upon the following facts:

> "Thos. Luce devised a piece of real estate, called Luce's tenement, to J. Dodge and Wm. Trail and their survivors (his executors), upon trust, to receive and apply the rents for the maintenance, education and advancement of his six children—John, Thomas, Henry, Francis, William and Elizabeth; and immediately on

> Elizabeth attaining twenty-one years, *then* he devised all his freehold and copyhold premises to his six children, and the survivor, or survivors, of them, their heirs and assigns forever, to hold as tenants in common."

By a codicil his daughter was placed with the other six children. Two of them died before the testator, leaving five, and one of the five, Thomas, died before Elizabeth attained twenty-one. His brother James, to whom the fifth descended, if he had any vested interest at the time of his death, conveyed the same to the plaintiff, and the question was, whether by the will the estate vested on the death of the testator, or this interest of the children was contingent till Elizabeth became twenty-one.

The Court held that the estate vested, at the death of the testator.

Here, it will be observed, that the estate was conveyed to trustees till Elizabeth arrived at the age of twenty-one, and the trustees in the meantime were to receive and apply the rents for the maintenance, education and advancement of said children; in other words, had till that time, an active trust requiring them to have title, and that the words in this will are much stronger in favor of creating a contingency, than the words of William Barr's will. The words were "and immediately *on* Elizabeth attaining twenty-one years, *then* he devised all the freehold and copyhold premises to his said six children," etc. The words of the will of William Barr are, "and upon the decease of said Maria Barr wife of John M. Barr (in case she survive him), if not, then upon the decease of John M. Barr, I do further give," etc. It is not as in the case of *Edward* v. *Symonds*, "I do *then* give."

These expressions, taken together, are much more like putting off the vesting of said estate, than in the case

now under consideration, and yet it was held that the estate vested on the death of the testator.

It will also appear that there was in this case an active trust imposed upon the trustees, until after the event, upon which it was claimed the estate was to vest, and if it be true, as I maintain it to be, that the trustees, under the will of William Barr, could have no trust—not even a dry trust, after the termination of the life estate of John M. Barr and wife, the case is, in this aspect of it, a direct authority in favor of our position, that the estate in the farm in question vested in Mary Jane Barr, on the death of the testator.

The question of vesting of estates, under very similar circumstances, was presented in the case of *Doe* v. *Norvel*, 1 *Maule & Sel.* 334. Sarah Trimmer, the testatrix, devised as follows:

> "I give and devise all my freehold estates in the city of London, and county of Surrey, or elsewhere, to my said nephew, John Roake, for his life * * * * * and *on* decease of my said nephew John Roake, I devise all my said estates * * * * to, and *among his children, lawfully begotten, equally at the age of twenty-one, and their heirs, as tenants in common. But if only one child shall live to attain such age, to him or her, and his or her heirs, at his or her age of twenty-one; and in case my said nephew John Roake shall die without lawful issue, or such lawful issue shall die before twenty-one*, then I devise all said estates to and among my said nephews and neices," etc.

The testatrix died, leaving John Roake, the devisee, her heir at law. He was then a widower, never having had any children, but on the 10th of May, 1787, he married, and afterward had four children, the lessors of the plain-

tiff. In 1789 he levied a fine of the premises, two only of the children having been born. In 1797 he suffered a fine and recovery in favor of such person as he should appoint, and in 1802 he appointed the same in fee to the defendants, his four children being then alive, but all of them under twenty-one. Before commencing a suit, two of the children became of age, and made formal entry, for the purpose of avoiding the fine. And the question was, what interest the lessor of the plaintiff took under the will, and whether the fine and recovery barred the same?

This involved the question, whether the remainder was vested or contingent, from the death of the testator, and before children arrived at the age of twenty-one? and the court held that they took vested remainders.

Here again we have language identical with that named in this will, "and on the decease of my said nephew, John Roake, I devise all my said estates," etc.

The case of *Findlay, et al.* v. *King's Lessee*, 3 Peters, 376, goes to show how strongly the courts in this country lean toward the vesting of estates created by wills. The question arose upon the following clause of William King's will:

> "In case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King, son of brother James King, on condition of his marrying a daughter of William Triggs, and my niece Rachel, his wife, lately Rachel Finlay, in trust for the eldest son or issue of said marriage; and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg, that will marry a child of my brother James King, or of sister Elizabeth, wife to John Mitchell, and to their issue."

After the death of the testator, William Trigg died, leaving his wife Rachel and four sons (never having had any daughters), who were living at the time. Mary, the wife of William King was living, aged forty-three years, and was at the time wife of Francis Smith. William King, the lessor of the plaintiff, was at the time, married to Sarah Bekem. James King had only one daughter, who was the wife of Alexander McCall and Elizabeth, the wife of John Mitchell, had two daughters, both married, one to William Heiskill and one to Abr. B. Trigg. At the time of the commencement of the suit no such marriage had taken place as was provided for, and according to all human probability, none ever could take place, as the parties were all otherwise married. The question was, whether the estate vested in William King, he never having married according to the terms of the devise. It was determined that William King took a vested estate, that the condition of marriage was subsequent, and that William King had his whole life to perform it in.

Chief Justice Marshall gave the opinion of the court, and among other things says:

> "It is a general rule that a devise in words of the present time, as I give to 'A' my lands in 'B,' imports, if no contrary intent appears, an immediate interest, which vests in the devisee on the death of the testator. It is also a general rule, that, if an estate be given on a condition, for the performance of which no time is limited, the devisee has his life for performance."

The early case of *Boraston*, 3 Coke, 52, was upon a will with the following clause:

> "Item. I give to Thomas Amery and Amphillis, his wife, all that my upper part of my close called Redding, for eight years next after my decease. * *

> And after the term of said eight years, the said upper part to remain to my executors, *until such time* as said Hugh Boraston shall accomplish his full age of twenty-one years, and the mean profits to be employed by my executors toward the performance of this my last will and testament; and *when* the said Hugh shall come to his age of twenty-one years, then I will he shall enjoy the upper part to him and his heirs forever."

Hugh Boraston died when he was but nine years old, and while the trust in the executors was in full force. It was nevertheless, held, that the estate vested in him on the death of the testator.

The trust in this case was to exist until the particular estate expired, and the trustees had active duties to perform under the trust.

In *Phipps* v. *Ackers*, 9 Cl. and Fin. 538, a testator gave all his real and personal estate to trustees:

> "And as to the land in 'W,' they, my trustees, shall stand seized and be possessed thereof in trust, and to the intent and purpose to assign, convey and assure the same, unto my god-son George Holland Ackers, eldest son of my nephew George Ackers, *when* and *so soon* as he, my said god-son, shall attain his age of twenty-one years. * * * But in case my said god-son, G. H. Ackers, *shall depart this life before he attain the said age of twenty-one, without leaving issue of his body lawfully to be begotten, then and in such case*, the said lands in 'W,' aforesaid, hereinbefore devised to him, shall sink into and become part of the residue of my real and personal estate, and go according to the disposition thereof, hereinafter expressed and contained."

Before George Holland Ackers became twenty-one, Mr. Phipps, the party entitled to the residue, filed a bill to

obtain the rents, claiming that the estate to Geo. H. Ackers did not vest until he became twenty-one. The case went to the House of Lords, and the common law judges were called in for an opinion, which they gave through Chief Justice Tindall, to the effect that the estate vested in Geo. H. Ackers on the death of the testator, subject to divest, should he die under twenty-one, and without issue. "The cases go on the principle," he says,

> "That the subsequent gift over, in the event of the devisee dying under twenty-one, sufficiently shows the meaning of the testator to have been that the first devisee should take whatsoever interest the party claiming under the devise over is not entitled to, which, of course, gives him the immediate interest, *subject only to the chance* of its being divested on a future contingency." 9 Cl. & Fin. 591, 592

In this case the trustees were to hold until George H. Ackers attained the age of twenty-one, and they were then to convey the estate to him.

In our case there is a devise to the children of John M. Barr and their heirs, in the present tense, "I do further give," with a devise over upon the contingency that should such children die without leaving issue, at the death of John M. Barr; that was the contingency (and there was no other) which gave the sons-in-law "*the chance*" of taking the estate.

In this case the House of Lords reviewed *Doe ex dem. Hunt* v. *Moore; Brownfield* v. *Crowder; Edwards* v. *Hammond; Mansfield* v. *Duyard; Goodtitle* v. *Whitby*, and *Boraston's case;* and affirmed them.

In *Stanley* v. *Stanley*, 16 Ves. 491, there was a

> "Devise to trustees and their heirs in trust, to receive the rents, etc., until 'A' shall attain twenty-one, and

immediately after he shall attain twenty-one, to convey to the use of 'A' for life, and from and after the determination of that estate, by forfeiture or otherwise, in his life, to trustees and their heirs during his life, upon trust to preserve the contingent uses, and after his decease to the use of his first and other sons in tail male, and for default of such issue, or in case of the death of 'A' before twenty-one, upon a similar trust for others, with direction for the accumulation of the rents till 'A' arrived at twenty-one, and invest them."

It was held, that 'A' took a vested remainder for life, after an estate in the trustees, for so many years as his minority may last.

In this case the devise was with the following clause:

"Provided, always, that in case the said Thomas Massey, John Massey and Charles, or any of them, or any younger son of Thomas Stanley Massey, should become possessed of the estate at Puddington * * * the devise or limitation herein before made, or directed to be made, of the messuages * * * hereinbefore demised, shall cease and become void, or not take effect, or be made as the case may be, and the person next in remainder, under said limitation or directions, shall become entitled to the possession of said lands," etc.

In commenting upon the claims set up, in reference to this proviso, SIR WILLIAM GRANT said:

"It was said lastly, that, being an executory trust, it is to be executed by directing the conveyance so as best to answer the apparent intention; namely, to prevent the union of the two estates in the same person, and to keep them asunder as long as can be by law. The testator has not said that was his intention. It is only inferred from the provision for the purpose of preventing the union of the estates in certain per-

sons specified. What ground is there for extending to other persons the incapacity of holding both estates? He has not said that a son of Thomas shall lose the devised estate by becoming possessed of the Puddington estate." 16 Ves. 511—

The learned editor, in a note to this case, uses the following language:

"A devise over, upon a contingency, can not, of itself, prevent the interest from vesting in the mean time. *Skey* v. *Barnes*, 3 Meriv. 340; and see ante, note 3 to *Malim* v. *Keighley*, 2 V. 333. The testator's intention to secure an estate to successive devisees can not authorize a court to introduce, by implication, any provision which the testator has not indicated; and if, where nothing is expressed, nothing is to be implied, it would be still more out of the question, where something is expressed, to imply more than is expressed. The testator's intent must be measured by the provisions he has himself made." 16 Ves. 512

William Barr here did express, clearly and distinctly, the contingency upon which the estate, vested in the children of John M. Barr, was to go to the sons-in-law. It was in "case John M. Barr died without leaving issue of his body." He did not express any intention as to their surviving Maria Barr in this connection; and can the court add the further condition (as to which the will is entirely silent), that if Maria Barr die without leaving issue of John M. Barr, that the estate is to go to the sons-in-law?

The above remarks of SIR WILLIAM GRANT are a very good answer to the assumption of counsel (for it is mere assumption) that William Barr never intended this farm, in any contingency, should pass to his brother and sisters. It is impossible for the court to say that he contemplated

the innumerable contingencies which might happen in the future affecting such a result, and intended to provide for them. The will is silent upon the subject. See, also,

Brewster *v.* Angell, 1 Jac. & Wal. 608.
Nash *v.* Smith, 17 Ves. 32.
Wheate *v.* Hall, 17 Ves. 85.

There are many other cases that might be cited very similar to the case before the court, in which the estate was held to vest.

It will be admitted, that the estate must vest unless there is a clear intent of the testator to the contrary, on some rule of law, which makes it impossible that it should vest. And the learned counsel for the plaintiffs maintain, that there is such principle of law and such clear intention, resulting from the trust to the sons-in-law. They claim that the will creates a fee in the sons-in-law in trust, and as two fees can not exist at one and the same time, that the remainder could not therefore possibly vest in Mary Jane Barr.

Now, there are, at least, two very good and sufficient answers to this point.

First.—The *fee* did not pass to the sons-in-law under this will. The most that can be claimed in this direction, is, that they took but an estate *per autre vie.*

Second.—If it did pass, it was a dry, naked trust of the *legal* title, and could not prevent the vesting of the *equitable* fee in Mary Jane Barr, and did not entitle the sons-in-law to the possession as against such equitable fee. An ejectment would not, therefore, lie upon such dry legal trust, as against the equitable title, followed by continued possession, as it has been in this case.

THE SONS-IN-LAW OF WILLIAM BARR, SEN., TOOK BUT A LIFE ESTATE, IN TRUST.

FIRST.—Did this will create a fee in William Barr, James Keys, and John B. Enness, sons-in-law of William Barr, senior, in trust?

Like all other questions under this will, this is one of intention, to be gathered from the will, and such other facts as may legitimately and legally bear upon it. As I read this will, it is very clear that it was not intended to pass the fee to these trustees. It was intended to place the legal title in them, until the uses limited to John M. Barr and his wife, had expired, *and no longer*. It must be admitted that the only purpose of this trust, was to accompany these equitable life estates, and be "a conservative power" over them, to use the language of the learned counsel for the plaintiffs.

The language of the will most clearly indicates that this trust estate is only to last, at furthest, as long as the equitable life estates last; and it is in such language that, according to many authorities, no legal title, whatsoever, passed by it. See,

Kennick *v.* Lord, Wm. Beauclerck, 3 Bos. & P. 179.
Hawker *v.* Hawker, 3 Barn. & Ald. 545.
2 Jarman on Wills, 205, 206.
Doe *ex dem* Leicester *v.* Briggs, 2 Taunt. 112, 113.

But, waiving these authorities, suppose some legal title to have passed to them, what was it? Was it a *fee*, or was it an estate *per autre vie*, for the life of the survivor of John M. Barr and his wife?

The language of the will is as follows:

"I give and devise unto my sons-in-law, William Barr, James Keys and John B. Enness, of Cincinnati, aforesaid, and to their heirs, all and singular that certain

farm * * * to hold the same premises to them and their heirs, in trust; (first), for the use of my son, John M. Barr, during his natural life, but, nevertheless, to permit and suffer my son, John M. Barr, to *hold*, *use*, *occupy*, *possess* and *enjoy* the said farm, and to *receive* and *take* the rents and profits thereof, during his natural life. And in case my said son, John M. Barr, should die, leaving a legitimate child or children, then also in trust for Maria Barr, wife of said John M. Barr, in case she survive him, during her natural life, for the purpose of maintaining herself and the said child or children, and educating said children; but, nevertheless, to permit and suffer the said Maria Barr, wife of the said John M. Barr, to *hold*, *use*, *occupy*, *possess* and *enjoy* the said farm, and *receive* and *take* the rents and profits thereof, during her natural life."

Here the trust ends; and then follows a direct gift to the child or children of John M. Barr, which is in no way connected with the trust, in the following language:

"And upon the decease of said Maria Barr, wife of said John M. Barr, in case she survive him; if not, then upon the decease of John M. Barr, I do *further* give and devise the *remainder* of my *estate* in said farm, unto the legitimate child or children of John M. Barr and their heirs forever. If my son leave but one child, as aforesaid, then I give and devise the said farm to him or her, or his or her heirs forever. But, if he leave two or more children, then I give and devise the said farm unto such children and their heirs, to be equally divided between them. But should my said son, John M. Barr, die without leaving any issue of his body, *then, and in that case*, I do give and devise the *remainder* of my *estate* in the said farm, unto my said sons-in-law, Wm. Barr, James Keys and John B. Enness, and their heirs forever."

This is all of the will that bears upon the conveyance of this farm, and the following position relating to the same, can not, I think, be controverted.

First. There is no interest or estate in the farm, that is not conveyed by the above clauses of the will. There is nothing left for the residuary clause of the will to act upon, in reference to this farm.

Second. The remainder to the sons-in-law, was contingent upon the death of John M. Barr without issue, and had Mary Jane Barr died before her father, and after the testator's death, then, the remainder vested in her, would have divested in favor of the sons-in-law.

Blanchard *v.* Blanchard, 1 Allen, 227.
Mining *v.* Batdorf, 5 Barr, 506.
Chew's Appeal, 37 Penn. 29.
Moore *v.* Lyons, 25 Wend.
Williamson *v.* Field, 2 Sandf. Ch. R. 551.
Jeffers *v.* Lampton, 10 Ohio St. R. 104.
Johnson *v.* Valentine, 4 Sandf. R. 45.
Findley *v.* King, 3 Pets.'376.
Stanley *v.* Stanley, 16 Ves. 506.
Phipps *v.* Ackers, 9 Cl. & Fin. 538.

Third. The words are in the present tense, and under rules before stated, they import a present vesting of the estate, which is generally regarded as conclusive, unless where there is in the will, a clear intent to the contrary. *Finley* v. *King's Lessee*, 3 Pets. 376.

Fourth. The life estate of Maria Barr, depends upon her surviving John M. Barr, and upon his leaving legitimate issue. It is simply a provision for the widow, taken from the estate vested in Mary Jane Barr, and postponing the exclusive possession only, and not the vesting.

Fifth. The estate given to the trustees, though given, in terms, to them and their heirs, is nevertheless a dry, naked trust, imposing no active duties of any kind upon

them, *and it is clearly limited to the life of the survivor of John M. Barr and wife*, and is, therefore, but an estate for the life of another, and not a fee; and could not, therefore, prevent the vesting of the remainder in Mary Jane Barr, at the death of William Barr, senior.

In favor of the intention of the testator, and because wills are sometimes made *inops consillii*, it is a well-established rule that a fee may be created without the use of the technical word "heirs," provided it appear, either from the other language of the will or the purposes thereof, to have been so intended; and it is equally clear, and results from the same general rule, that the use of the technical term, "heirs," will not create a fee, if such appears to have been the intent of the testator. For instance: suppose a will to give real estate to "A" and his "heirs" for the use of "B" for twenty years, or for twenty years and no longer; would that create anything but a chattel interest, though the technical language for creating a fee was used? Or, suppose a testator devise a certain farm to trustees and their heirs, in trust for "A" for and during his natural life, and impose no duties upon the trustees requiring that they should have a fee; and should then follow such devise to the trustees by the following language: "And upon the death of the said "A," I do further give and devise the remainder of my estate in said farm to "B," without mentioning the trust further; would it not be perfectly clear, that the estate devised to the trustees would be but an estate for the life of "A"?

Now, that is precisely the case under consideration. If nothing else is clearly expressed in this will, it is clearly expressed that the estate given to Wm. Barr, James Keys and John B. Enness, in trust, was to last only so long as the survivor of John M. Barr and his wife lived.

There is no other fair way to read this will:

"I give and devise unto my sons-in-law, William Barr,

> James Keys and John B. Enness, and to their heirs, all and singular that certain farm, * * * to have the same premises to them and their heirs, in trust, for the use of my son, *for and during his natural life.* * * * Also in trust for Maria Barr, wife of said John M. Barr, in case she survive him, *during her natural life.* * * * And upon the decease," etc., "I do further give and devise" (it is not, in trust,) "the remainder of my estate in said farm unto the legitimate child, or children," etc.

This clearly shows that the trust, whatever it was, was to last only so long as these life estates; and under the rules for construing wills, was but a life estate. See *Lewin on Trusts*, 234, 235.

The first devise is directly to William Barr, James Keys and John B. Enness, in trust, for the use of these persons for life only; and then follows the devise of the *remainder* of *the estate*, in the farm, directly to the child or children of John M. Barr.

How, pray, could there *be any remainder of the estate in the farm* if the *whole estate* had been devised to the trustees?

All this is made still more clear, when we consider that the clause relating to this trust estate, required no action, or active performance of duties, of these trustees; and that they were "to permit" the life tenants "to *hold, use, occupy, possess and enjoy* the said farm, and to *receive* and *take* the rents and profits thereof during their natural lives." The life tenants were "to *hold, use,*" etc. Thus making it, purely and simply, a naked or dry trust—what I understand the learned counsel for the plaintiffs to mean, or to refer to, when he speaks of "a conservative power" provided by the testator. Because of John M. Barr's in-

temperance, he had placed, in these trustees, a shadow upon the title during his life.

The authorities are full to the point that trustees named in a will, take only such estate in the property as may be necessary for them to fulfill the purposes of their trust.

Lewin on Trusts, 234.
2 Jarman on Wills, 213.
Webster *v.* Cooper, 14 How. 499.
Kenrick *v.* Lord Beauclerck, 3 B. and P. 179.
Doe ex dem. Compere *v.* Hick, 7 Term. R. 437.
Blaker *v.* Auscomb, 1 New Rep. 27.
Curtis *v.* Price, 12 Ves. Jr. 98, 99.
Morrant *v.* Gough, 7 Barn. and Cress. 211.
Right ex dem. Phillips *v.* Smith, 12 East. 461.
Broughton *v.* Langley, Ld. Raymond, 873.
Robinson *v.* Gray, 9 East. 1.
Farmer *v.* Francis, 9 Moore, 319.

It is also well established, that where an estate is given by will, to trustees and their heirs, that such estate will be but a life estate, if it appear that it was for the use of parties for life, and there be no purpose of the trust requiring the vesting of a fee in the trustees.

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It is also laid down as a rule, that when the trust requires no active duties of the trustees, but is in terms like those of the will in question, "to permit and suffer John M. Barr to hold, use, occupy, possess, and enjoy the said farm, and to receive and take the rents and profits thereof," it is but a dry, naked trust, and vests no legal title in the trustee whatsoever.

2 Jarman on Wills, 202, 203.
Doe ex dem. Leicester *v.* Biggs, 2 Taunt. 113.
Right, Lessee of Phillips, *v.* Smith, 12 East, 461.
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These cases do not, I think, depend upon the statute of uses. But if it were otherwise, still the trust gives no such right to the possession as would enable the trustee to maintain ejectment against the equitable owner, or against those claiming under such equitable owner; for a party to maintain ejectment must have not only the legal title, but the right of possession as against the defendant. *White* v. *City of Cincinnati*, 6 Pets. 443; *Adams on Ejectment*, 33.

Sixth. But as this is the main point of the argument of the learned counsel for the plaintiffs, and in deference to their very great ability, I will call attention more particularly to some cases showing that no fee did vest in the sons-in-law, notwithstanding the farm was [illegible] and their heirs.

The case of *Doe ex dem. Compere v. Hicks et al.* related to the will of Thomas Compere, and the will devised:

"His land and hereditaments in the parish of Whitcombe, etc., *after* the decease of his wife, to his father, A. C., for life, remainder for John Compere for life, and *from and after* the determination of that estate, *unto trustees and their heirs to preserve contingent remainders from being defeated, and to make entries and bring actions, etc.; nevertheless, to permit the said John Compere to receive the rents and profits during his life, and from and after his decease, unto the first and other sons of the body of the said J. C.* in tail male successively, and in default of such, unto his brother Anthony Compere" (by whom the fine was levied) "for life, *and after that estate determined, unto the said trustees and their heirs to preserve the contingent remainders in manner aforesaid; and from and*

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after the decease of his brother, A. Compere, to the first and other sons of his body in tail male successively, and for want of such issue, unto his nephew R. Austine, for life, and after that estate determined unto the said trustees and their heirs, in manner as aforesaid; and to the first and other sons of his body in tail successively, and for want of such issue unto his cousin, G. Compere, for life, then to the trustees and their heirs in manner aforesaid; then to the first and other sons of his body successively, in tail male, and for want of such issue unto the son of T. Compere, deceased, for life, then to the trustees and their heirs in manner aforesaid; then to the first and other sons of his body successively, in tail male, and for want of such issue then to the second son of said Thomas C., deceased, for life, then to the said trustees in manner aforesaid, then to the first and other sons of his body in tail male successively, and for want of such issue, unto his own right heirs forever."

The principal question discussed, was whether the trustees took a fee, or whether it was but an estate for life.

Chief Justice Kenyon, delivered the opinion of the court, from which I take the following:

"I am glad to find, upon looking through the whole of this will, that the trustees did not take the absolute fee; for, though, if they had taken such an estate, the present claimant, who is unquestionably entitled to the beneficial interest in the estate, would not ultimately be disappointed, yet he would be driven to a more expensive and circuitous mode of proceeding, in order to obtain it. We are to collect the devisor's intention from the whole will; and I agree with the plaintiff's counsel, that taking the whole instrument together, it appears that he intended that the trustees should only take during the lives of several tenants for life, in order to protect the contingent remainder, though the words, during the life of the

> tenant for life, are not inserted in the will in the limitations to the trustees." * * * "On the same principle, therefore, that it was necessary in that case (*Venables* v. *Morris*), that the trustees should have the legal estate, to answer the intention of the parties, I think it is not necessary in this case, that they should take the legal estate for a larger term than during the lives of the tenants for lives, since this construction will best answer the intention of this testator."

In that case, the estate to the trustees was not to the same extent a naked trust, as is that in the devise of Wm. Barr. The trustees were "to make entries, bring actions," etc., as well as "to permit the said John Compere to receive the rents and profits during his life."

The court looked through the whole will, and found that the testator did not mean to confer but a life estate, and, therefore, though it had been devised to them and *their heirs*, held that the devise created but a life estate.

In *Curtis* v. *Price*, Sir Wm. Grant, adopts the same conclusion, and approves and follows the case of *Doe* v. *Hicks*, before referred to, and this too, in relation to a marriage settlement.

Blaker et al. v. *Ancombe*, 1 New. R. 25, presented this question under the following circumstances:

> "By lease and release, the premises were, in pursuance of marriage articles of John Walden and Sarah, his wife, conveyed to Thomas Tourle, *his heirs and assigns*, to the intent that he should be tenant to the præcipe for suffering a common recovery, the uses of which, when suffered, were declared to be to William Blaker and Walter Haborne (the plaintiffs), their heirs and assigns for and during the natural life of said Sarah Walden, in trust, *to pay the rents and profits* in such manner as the said Sarah, not-

withstanding her coverture shall appoint; and *from and immediately after the decease* of the said Sarah Walden, in trust, to pay the rents and profits in such manner as the said Sarah, notwithstanding her coverture should appoint; and from and immediately after the decease of said Sarah Walden, in trust, to pay the rents and profits in such manner as the said Sarah, notwithstanding her coverture should appoint, and from and immediately after the decease of said Sarah Walden, to the use of such child or children of said marriage, and in such shares as the said Sarah should appoint, and for the want of appointment, to the use of the children, equally between them as tenants in common and the heirs of their respective bodies, with cross-remainders, and in default of such issues, to the use of the right heirs of Sarah Walden, forever."

A recovery was suffered in pursuance of the settlement. The action was trover, for cutting down and taking away trees, and the defense was, that the trees belonged to the owner of the fee.

The question was, whether the trustees took an estate of inheritance, or an estate *per autre vie;* and it was held that, notwithstanding the use of the technical terms, creating a fee in the trustees, they had but a life estate, and could not recover.

Sir James Mansfield, Chief Justice, says:

"How can it be made out that the trustees, in this case, had any greater estate than during the life of the tenant for life. If they had no greater estate, they can not possibly maintain this action. Had the limitation been to the trustees and their heirs, to the use of them and their heirs, the case might have been very different. It is true, that the parties had a special property in the trees while standing, but that property ceased when they were cut down."

HEATH, J., says:

"It occurred to me at the trial, that the estate of the trustees might possibly be considered as commensurate with the different limitations in the settlement, but I am satisfied that the estate limited to them, was only *per autre vie*, and, consequently, that this action can not be maintained. There is a distinction between limitations by settlement and limitations by will. In the latter case, they are construed according to the intention of the testator, and the trustees, under a limitation of this sort, might be considered as having an estate commensurate with the subsequent limitations, but that mode of construction can not be applied to a limitation by settlement."

ROOKE, J., concurred.

In that case, the limitation was to the trustees and their heirs, and the purposes of the trust, required the *trustees to pay the rents* to the life tenants. In our case, nothing of the kind appears, but they were "to *permit* the life tenant to hold, use, occupy, possess and enjoy the farm, and to receive and take the rents and profits," terms, which, according to many authorities, vest no legal estate in the trustees, whatsoever.

Mr. Jarman, in his treatise on wills, states the same doctrine in the following language:

"The reader will have perceived (though the position has not hitherto been distinctly advanced), that the same principle which determines whether the trustees take any estate, regulates also the nature and duration of that estate, the established doctrine being (subject to certain positive rules of construction, lately propounded by the legislature, and which will be presently considered), *that trustees take exactly that quantity of interest which the purposes of the*

trust require; and the question is not, whether the testator has used words of limitation or expressions adequate to carry an estate of inheritance, but whether the exigencies of the trust demand the fee simple, or can be satisfied by any and what less estate.

Thus, in the case of a devise to a trustee and his heirs, upon trust to pay and apply the rents, for the benefit of a person for life and after his decease, to hold the lands in trust for other persons, the direction to apply the rents being limited to the *cestui qui trust* for life, the estate of the trustees will terminate at his decease. And it seems, that a limitation to trustees and their heirs may be restrained by implication to estates *per autre vie, even in a deed.*"

1 Lewin on Trusts 282

I take the following from the chapter of LEWIN ON TRUSTS, entitled, "WHAT ESTATE WILL BE VESTED IN THE TRUSTEE":

"As the effect of a deed or will is to be ruled by the intention, and every person in limiting an estate to a trustee must be guided by the equity he proposes to raise upon it, the court is necessarily led to enter upon the consideration of the trust, in order to *measure the extent of the legal interest* by *the scope and object of the equitable.* The following rules of construction have in consequence been adopted:

First. Wherever a trust is created, a legal estate sufficient for the execution of the trust shall, if possible, be implied; *secondly,* the legal estate limited to the trustee *shall not be carried further than the complete execution of the trust necessarily requires.*"

1 Lewin on Trusts 163. 164

Now, in the light of these authorities (and others might be cited to the same effect,) can anything be more clear, than that Wm. Barr, James Keys and John B. Enness, took but a life estate, in trust, under this will?

First. It is expressed to be in trust for the lives of John M. Barr and Maria Barr, and nothing further.

Second. It is not "to take and receive the rents, and pay them over to the life tenants," but "*to permit* and suffer" *them* "*to hold, use, occupy, possess* and *enjoy* the said farm, and *to receive* and *take* the rents and profits thereof," during their natural lives.

The trustees were to do nothing whatsoever, and the trust estate was a mere shadow that was to hang over John M. Barr, for life, because of his intemperance; and over Maria Barr, for the benefit of the child during her life—imposing no active duty whatsoever—"a conservative power," as Mr. Ewing calls it, requiring, nevertheless, no active duty—a mere naked, dry trust. So the life tenants and so the trustees understood it; and, therefore, the trustees did nothing during the life of John M. Barr, and after his death, they denied that Maria Barr had any interest, and undertook to oust her.

Third. But what seems still more conclusive, is, that the naked legal title is first placed in these trustees and their heirs, simply for the lives of John M. Barr and his wife Maria, (*no estate being directly devised to them,*) and and upon the termination of such estate for life, so placed in the trustees, "the *remainder of the said estate* in said farm," is devised to the child or children of John M. Barr, in this most significant language: "I do *further* give and devise the *remainder* of *my estate* in said farm unto the legitimate child or children of the said John M. Barr, and their heirs forever."

Thus having devised, in this very connection, the estate to Wm. Barr, James Keys and John B. Enness, and their heirs, in trust for the use of John M. Barr and Maria Barr *for life,* he then devises the *remainder* of the *estate* to the children of John M. and Maria Barr, upon the death of the latter. As trustees, Wm. Barr, James Keys and John B. Enness have no further connection with it.

Fourth. This is made more clear by the contingent limitation made to them in this very connection, in case John M. Barr die without leaving any issue. It is not *the use* that is devised to them in this connection, as it was not *the use* that was devised to the children of John M. Barr, but the legal fee. It was the legal estate first devised to them in trust, that was devised under these words, "I do further give and devise the remainder of my estate in said farm." And it was the same legal estate that was contingently devised to them in case John M. Barr died without leaving any issue of his body.

If it had been *the use* that was devised to the children of John M. Barr, then the devise would have read, "And upon the decease of Maria Barr, etc., also in trust for the legitimate child or children of John M. Barr, and their heirs forever." Or, "upon the decease of Maria Barr, etc., then also to the use of the legitimate child or children of John M. Barr, their heirs," etc. It would not have read as it does, "And upon the decease of Maria Barr," etc., "I do *further* give and devise the *remainder* of *my estate* in said farm to the legitimate child or children," referring directly to the prior devise to them as trustees for life, given in the first clause of the will.

What can the word "*further*," in this connection, mean, unless it be in reference to the only thing that had previously been devised, to wit: the estate to William Barr, James Keys and John B. Enness, and their heirs, in trust for John M. Barr and his wife, *for life;* in other words, than to the estate *per autre vie*, devised them.

This construction does not entirely do away with the term "heirs," (though that is often done in wills, to carry out the intention of the testator,) for the trustees might all die during the lives of John M. Barr and wife; in which event the legal title would descend to their heirs "in trust."

Fifth. The trust here did not in any way require a fee. The trustees had no power to lease, sell or mortgage for the purpose of raising means for the life tenants or the children. Nor were the latter to receive the title from or through the trustees, after the decease of John M. and Maria Barr—circumstances so often found in wills, and which have determined whether the devise to trustees and their heirs was to create a chattel interest, a life estate, or a fee.

There is not the slightest intimation in this will, nor the remotest purpose of it, whether it be gathered from the will itself, or from the situation of the family and property of the testator, that can be held to indicate that the trustees were to hold the legal title *for the children* of John M. Barr, or that the children were to receive it from the trustees, or through them; or that it was given them to preserve to them the fee upon the contingency provided for them. The only purpose of the trust is understood to have been the intemperance of John M. Barr, and the support of the child during the life estate of Maria, should she outlive John M. Barr. What these trustees might have done under this will it is very difficult to decide in any given state of circumstances; probably in a clear case calling for some intervention to protect the life tenants or the child, during its mother's life, they might have called in the aid of a court of equity to protect these interests.—This trust would have given them a standing in a court of equity for such a purpose; and as it was drawn by an old lawyer, familiar with these decisions, this was probably all he intended by the peculiar language he has used in creating the trust.

Indeed, I do not understand that the learned counsel for the plaintiffs, either of them, claim that if Mary Jane Barr had outlived her mother, that the trustees would have

held the legal title after the death of Maria Barr, or that in that event the legal fee would not have passed at once to this child by virtue of the clause in the will: "I do further give the remainder of my estate in the said farm to the legitimate child or children of John M. Barr and their heirs," without any conveyance or release from these trustees or any decree of a court placing the legal title there. It would have passed by virtue of these words of the will.

Sixth. And there are certain facts connected with the family and the disposition of the property of William Barr, Sen., that sustains this view.

1st. None of the parties considered the trust anything but a dry, naked trust, or one to last beyond the life estate.

The conduct of the trustees shows it, for they did nothing with the property in the life of John M. Barr, except to lease it once as agent for John M. Barr, and soon after his death, claimed it as their own, against Mrs. Barr, and commenced legal proceedings against her for it.

2nd. This farm, at the time, was not worth more than $3,000. The rents show, that for years after Mr. Barr's death, it was not worth more than $3,000. It did not rent for more than $200 ($50 dollars of which, was to be expended on the farm), until after 1827. See *Leases in Evidence.*

And it appears that Wm. Barr, Senior, had made large advances to his daughters—all he intended they should have from his property. This is shown by the deeds of John B. Enness to Sandige (see *Appendix—Exhibits, D.*), and from the fact that the testator must have had a large amount of personal property, within two years prior to his death. This appears from the sales in Shippensburg, some time before his death, amounting to over $21,000. (See among others, the two deeds of William Barr, to Frederick Boas and to Joseph McKinney, Nos. 3 and 4). The

rents show that this money could not have been expended on this farm. And the will itself, shows, that he had a large amount of personalty on hand; and yet the sons-in-law, who were executors, have never returned any account to the Probate Court, for the reason of the advancements to William Barr's daughters. Indeed, the property specially named in the will, and given to each of the sons-in-law, under the residuary clause, was equal to the then value of this farm. *See transcripts from Probate Court.*

Third. Mary Jane Barr was of the blood of the testator, in the favored line; whereas, his sons-in-law were not of his blood, and might have conveyed the farm to persons not of his blood; or by marriage, and the birth of children, it might soon descend to those not of his blood, if vested in the sons-in-law; whereas, by vesting the same in the children of John M. Barr, it could not, for years, at least, be taken from his blood-relations, whatever might happen, as John M. Barr had no children but Mary Jane Barr, then about three months old, and her heirs were of his blood.

It was, therefore, a most natural provision of the will to give this property to John M. Barr's legitimate children, rather than to his sons-in-law. His general idea seems to have been, that, as he had made large advances to his daughters (all he intended they should have), and, as he was, by this will, giving each of his sons-in-law as much as the value of this farm, he would leave this to John M. Barr's family. He gave to the sons-in-law the fee absolutely without further contingency, and he would have so given the farm to John M. Barr, but for his intemperance, and on his death, it would have descended to Mary Jane Barr. On account of his intemperance, he gave him the use for life, and vested the fee in his children. The sons-in-law and their children, might die before Mary Jane Barr's issue, or her issue might outlive the issue of

the sons-in-law, but he does not seem to have thought it best to follow his estate into the innumerable contingencies, that might happen after the death of his sons-in-law, or Mary Jane Barr, if she outlived her father. She was young, and her father might die without leaving issue. He, therefore, made a few specific provisions, without expressing any general plan in his will, and these provisions are clearly defined in the will. For some reasons, it does not expressly appear why Wm. Barr, Senior, did dispose of all his remaining property without giving any of it to his daughters.

We say that it was because of the large advancements previously made to them, and which we have shown as fully as at this day we could be expected to. At any rate, he left his estate, where, by possible contingencies, it all might pass from his daughters. See *Mortgages to Sandige—Exhibit, D. & E.*

Seventh. And here I desire to refer to the position of the learned counsel, in relation to the intention of the testator upon the vesting of this remainder.

On page 9 of their able brief, they say:

> "The controlling question is, what was the intention of the testator, as to what disposition should be made of the farm, if, at the determination of the successive estates for life, *in the use* provided in favor of his said son, and his son's wife, there were no children of the said son, or *issue of his body*, living to take the estate? Was it his intention, that it should vest in the *testator's* other children or issues of *his* body? Or, did he intend, in such event, that it should pass from his own family—the issue of *his* body—and become the property of his brothers and sisters, and *their* legal representatives—the issue of *their* bodies? It can not be necessary to argue this proposition at much length; we think, not at all. We do not

> mean to have reference to the general question, as to what would have been the probable intention of the testator, if his intention had been directed to the particular subject; but, what in fact appears from the will and the attending circumstances, affirmatively, to have been his intention."

Now, with due deference to the very learned and able counsel, I say, that that is neither the controlling question nor the question at all; for the reason that it does not appear that William Barr, Senior, had any intention upon the subject whatsoever; or that he had any knowledge of or contemplated what would become of the property in that event; or that he ever contemplated the death of John M. Barr's children after his own death, and the death of his son, John M. Barr, but before the death of their mother. See *Fulton* v. *Fulton*, 2 Grant, 31.

There is no such principle, as that the testator is presumed to have contemplated every state of fact that could happen, and to provide for it. If such rule was adopted, the courts would make wills, instead of testators. And the only facts that can be considered by the court in aid of the construction of the will, are those existing at the time of its making, or at furthest, at the testator's death; and these must be facts relating to his property and family.

> Doe *v.* Martin, 1 Nev. & Man. 524.
> Doe *v.* Hiscocks, 5 Mees. & Wels. 367.
> Miller *v.* Travers, 8 Bing. 250.
> Tucker *v.* Sea. Aid Soc. 7 Met. 207.

No man can foresee the future, and it is very evident that none but the facts relating to his property and family, and which existed and were known at the time of the date of the will, or at his death, can be considered in reference to his intention; and such is the rule.

1 Greenleaf's Ev., sec. 287.
Willey *v.* Langstaff, 3 Dessaussure, 509.
Edens *v.* Williams, 3 Murphey, 50.

The object in construction, is not to find what the testator might have meant if he had been wiser than Lord Mansfield; or what he should have done in the light of subsequent events, and had he foreseen them; but in the light of the facts surrounding him, relating to his property and family: what he did in fact mean, or, rather, what, in the light of these facts, the will means—what passed under it.

Worman *v.* Teagarden, 2 Ohio St. Rep. 328.
Doe *v.* Martin, 1 Nev. & Man. 524.
Miller *v.* Travers, 8 Bing. 250.
Doe *v.* Hescocks, 5 Mees. & Wels. 367.
Tucker *v.* Seaman's Aid Soc., 7 Met. 207.

It is not the duty of the court, nor have they any right, in construing this will, to seek for the "probable intention of the testator," from facts and contingencies subsequent to his death, and in reference to which he has said nothing in his will; but, on the contrary, it is their duty to ask, what does the will itself mean? See *opinion of Sir Wm. Grant*, p. 32, and quotation there.

The question as stated by the learned counsel is ingeniously, but falsely, put. There is not the slightest expression in the will that he did contemplate, or intend, to provide specially for the case, other than results from the fact that he had vested the fee in the children of John M. Barr, and was there willing to leave it, to take such course as they might provide, or as the law provided for them. The contingencies that might happen in reference to his family were innumerable, and unless he provided for them in his will, the court can not consider them.

We need not rummage among the dusty facts and events relating to this family for the last fifty years, after the testator's death, to select out some one or more, which, if they had been foreseen by him, and he had taken our view of them, might have led him to make any given will.

It is not every fact that existed, even at the time of the making of the will, or at his death, that can be received in evidence; for we can not know the testator's likes and dislikes, his peculiarity of mind or temper, the freaks of affection, or the turn which his testamentary disposition might take. The question is, What does *this will* show that he intended in reference to the vesting of this remainder, upon his death, or that of John M. Barr.

Worman *v.* Teagarden, 2 Ohio St. R. 382.
Miller *v.* Travers, 8 Bing. 251.
Smith *v.* Bell, 6 Pets. 75.
Doe *v.* Martin, 1 Nev. & Man. 524.
Doe *v.* Hescocks, 5 Mees. & Wels. 367.
Tucker *v.* Seaman's Aid Soc., 7 Met. 207.

Indeed, under our system of law, the impropriety of all this must at once appear from a few moments' reflection; especially in relation to wills of fifty years standing. In this country all titles are of record, and parties purchasing consult the records, and purchase real estate as they find the title of record, then consult counsel and they advise with direct reference to these rules and authorities.

It appears, in this very case, that the title under this will has been passed upon by almost every leading member of the bar of Hamilton County, for the last fifty years, who have all concurred in the opinion that the estate vested in Mary Jane Barr, and did not divest upon her death before her mother, or pass to the sons-in-law. (See the opinions in printed pamphlet). Now, to permit the family to come in and present facts which may favor their

construction, and which, perhaps, they have all the time preserved with reference to the litigation, while they may have studiously kept out of view others, would result in destruction of record titles, and lead to the grossest injustice. And the fact, that such men as Judge Walker, Judge William Johnson, Nathaniel Wright, Jordan Pugh, and William Groesbeck, (to say nothing of my colleague) and others, who have, from time to time, as parties were purchasing this property, given their written opinions, that the fee did vest in Mary Jane Barr, and upon her death descended to the brothers and sisters of the testator, would seem to be pretty conclusive that her estate was not contingent upon her out living her mother, and did not divest in favor of the sons-in-law—or, to say the least of it, that it was not a clear case of a contingent remainder, or of the divesting of the estate on her death before her mother. Again, let me state this question as the learned counsel for the plaintiffs have done.

At the time this will was made, and at the death of the testator, Mary Jane Barr was a child about eight months old; just an age to be interesting to its grandfather. Its mother was young, and might live forty years, did in fact live more than that, and this child might have had children before its mother died; and the contemplation of this probability was just as likely, indeed more likely, to have presented itself to the mind of the testator, as the dying of the child before its mother.

Now, as the testator did not foresee, and could not foresee, its death before the mother, let us inquire of the intention of the testator as to the vesting of this remainder with reference to Mary Jane Barr's dying before her mother, and leaving legitimate children. Is there anything in this will to show clearly that he intended that this farm should

go to his sons-in-law, not of his blood, rather than to Mary Jane Barr's legitimate children?

If he contemplated the death of Mary Jane Barr before that of her mother, he was likely to say to himself "she may have children; in which case I desire the estate to descend to them. My daughters have had their share, and I am, by this very will leaving to each of my sons-in-law as much as this farm is worth. The farm is permanent property, and may descend to her and her children, and if in the chances of the uncertain future she shall die, (as I cannot forsee who of my family will then be living or their condition), let the estate descend to her heirs or take such course as she by will may appoint."

All this is equally probable, indeed, more pr
that he should have foreseen and provided for
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before that of her mother.

The case of *Doe* v. *Perryn*, 3 Term, R. [illegible], a somewhat similar question to that now suggested:

> James Cumberback devised his real estate to the niece of Dorothy Cumberback, wife of his nephew, James Cumberback, for life, remainder to trustees to preserve contingent remainders, remainder to all and every, the children of Dorothy Cumberback, and their heirs, to be equally divided between them, but if only one child, then to such child and his heirs, and for default of such issue, then to James Cumberback for life, remainder to trustees to preserve contingent remainders, and from and after the decease of the survivor of James Cumberback and Dorothy, his wife, without issue, then over.

The question was whether the children of Dorothy and James Cumberback took fees, and whether they vested before their death. The children were born, and died quite young, before their parents.

construction, and which, perhaps, they have all the time preserved with reference to the litigation, while they may have studiously kept out of view others, would result in destruction of record titles, and lead to the grossest injustice. And the fact, that such men as Judge Walker, Judge William Johnson, Nathaniel Wright, Jordan Pugh, and William Groesbeck, (to say nothing of my colleague) and others, who have, from time to time, as parties were purchasing this property, given their written opinions, that the fee did vest in Mary Jane Barr, and upon her death descended to the brothers and sisters of the testator, would seem to be pretty conclusive that her estate was not contingent upon her out living her mother, and did not divest in favor of the sons-in-law—or, to say the least of it, that it was not a clear case of a contingent remainder, or of the divesting of the estate on her death before her mother. Again, let me state this question as the learned counsel for the plaintiffs have done.

At the time this will was made, and at the death of the testator, Mary Jane Barr was a child about eight months old; just an age to be interesting to its grandfather. Its mother was young, and might live forty years, did in fact live more than that, and this child might have had children before its mother died; and the contemplation of this probability was just as likely, indeed more likely, to have presented itself to the mind of the testator, as the dying of the child before its mother.

Now, as the testator did not foresee, and could not foresee, its death before the mother, let us inquire of the intention of the testator as to the vesting of this remainder with reference to Mary Jane Barr's dying before her mother, and leaving legitimate children. Is there anything in this will to show clearly that he intended that this farm should

go to his sons-in-law, not of his blood, rather than to Mary Jane Barr's legitimate children?

If he contemplated the death of Mary Jane Barr before that of her mother, he was likely to say to himself "she may have children; in which case I desire the estate to descend to them. My daughters have had their share, and I am, by this very will leaving to each of my sons-in-law as much as this farm is worth. The farm is permanent property, and may descend to her and her children, and if in the chances of the uncertain future she shall die, (as I cannot forsee who of my family will then be living or their condition), let the estate descend to her heirs or take such course as she by will may appoint."

All this is equally probable, indeed, more probable than that he should have foreseen and provided for the death of John M. Barr before Mary Jane Barr, and then her death before that of her mother.

The case of *Doe* v. *Perryn*, 3 Term, R. 495, presented a somewhat similar question to that now suggested:

> James Cumberback devised his real estate to the niece of Dorothy Cumberback, wife of his nephew, James Cumberback, for life, remainder to trustees to preserve contingent remainders, remainder to all and every, the children of Dorothy Cumberback, and their heirs, to be equally divided between them, but if only one child, then to such child and his heirs, and for default of such issue, then to James Cumberback for life, remainder to trustees to preserve contingent remainders, and from and after the decease of the survivor of James Cumberback and Dorothy, his wife, without issue, then over.

The question was whether the children of Dorothy and James Cumberback took fees, and whether they vested before their death. The children were born, and died quite young, before their parents.

Buller, J., says,

"That courts of law always lean in favor of the vesting of estates; and therefore, on such a limitation as the present, they have said that the estate shall vest on the birth of a child, and without waiting for the death of the parents; which rule is not attended with any inconvenience to the children, because where the estate is limited to a number of children, it shall vest in the first, and afterwards open for the benefit of those who shall be born at a subsequent period. *But if this were held not to vest till the death of the parents, this inconvenience would follow, that it would not go to grand children; for if a child were born who died in the life time of his parents, leaving issue, such grand child could not take, which could not be supposed to be the intention of the devisor.*"

3 Durn. & East. 414, 425

Now, I do not claim that Wm. Barr, senior, had this state of case in mind, and therefore was content to vest the estate in the children of John M. Barr, and that he did not have the state of fact before him which did happen. I simply say, that the court can not construe this will by reference to any subsequent state of facts, unless the *will* shows that the testator did forsee and act with reference to it, and that it does not appear in this will that he did have it in view. The estate in this farm can not vest or divest with reference to any such contingency not found in the will.

It is enough that, according to well settled principles of construction, he has vested the fee in this child, and did not care to venture further into the uncertain future.

The closing clause of the will of the GREAT LORD MANSFIELD is instructive in this connection. It reads:

"Those who are nearest and dearest to me, best know how to manage and improve, and ultimately in their turn to

> divide and subdivide the good things of this world, which I commit to their care, according to events and contingencies which it is impossible for me to foresee or trace through all the mazes of time and chance." *Lord Campbell's Lives of the Ch. Justices*, 2 vol. p. 421.

This is full of wisdom, and most touchingly said. Wm. Barr or his counsel may have had the same idea as to preserving his estate beyond the death of his son, John M. Barr.

I, therefore, claim that the vesting of the estate in the trustees for the lives of John M. Barr and Maria Barr, did not prevent the remnant of the estate in the farm from vesting in Mary Jane Barr, at the death of her grandfather.

Eighth. Nor can it be claimed that there is any thing in the subsequent language relating to the estate given the sons-in-law, which can reduce the estate given the child or children of John M. Barr and their heirs to any estate less than a fee? According to Mr. Ewing's position it can not be less than a fee. He says that this estate is a fee mounted upon the fee to the trustees, and therefore an executory devise. That is not my position. I agree with Mr. Ewing, that the estate given to the children of John M. Barr was the legal estate, and has direct reference to the estate previously given to the trustees; but I differ from him in this respect, for I say, that the estate given to the trustees was but an estate *per autre vie*, and the estate given the children and their heirs, was a vested remainder of the estate in fee.

> The subsequent words, "But should my said son, John M. Barr, die without leaving any issue of his body, *then, and in that case*, I do give and devise the re-

mainder of my estate in the said farm to my said sons-in-law," etc.

These words, it is very evident, were not intended to be restrictive of the word heirs, as applied to John M. Barr's children, or in any way a limitation of that estate, so that there could be any remainder thereof; but as descriptive of the contingency when that estate, before vested in them, was to be divested, and go to the sons-in-law.

In other words, the estate given the sons-in-law, was an executory devise, to arise in the event, and *only in the event*, that John M. Barr should die without leaving issue, the estate to the children was a vested remainder in fee, but it was subject to be divested, if John M. Barr died without issue; or to use the language of the will, "*then*, and in *that* case," to pass to the sons-in-law; a clear executory devise, limited upon that contingency, and to take effect only upon such contingency. That an absolute fee was conveyed to Mary Jane Barr, see,

Abbott *v.* Essex Co. 18 How. 213, 214.
Pells *v.* Brown, Croke James, 591.
Porter *v.* Bradley, 3 T. R. 146, 147.
Ex parte Davis, 9 Eng. L. & Eq. 92.
Doe *v.* Frost, 3 Barn. & Ald. 555.
Jordan *v.* Roach, 32 Miss. 481.
Roe *v.* Jeffers, 7 T. R. 596.
Richardson *v.* Noyes, 2 Mass. 61.

These authorities are directly in point, and are good law in Ohio. They are referred to and approved in *Niles* v. *Gray*, 12 Ohio St. Rep. 330-1-2.

They are also followed in the case of *Abbott* v. *Essex Co.* 18 How. 213, 214.

Mr. Hunter also intimates that, if Mary Jane Barr took a fee, it was a fee upon a condition. Pray, where does he

find the condition? The words, "upon the decease of Maria Barr," do not create a condition.

I also refer to *Fulton* v. *Fulton*, 2 Grant's R. 31, which lays down these rules, in a few words:

First. "That construction ought to be followed, which makes an estate vest absolutely at the earliest possible period."

Second. "That construction ought to be avoided, which converts a fee simple into a life estate, or an estate tail, by implication."

Third. That courts ought not to construe wills with reference to circumstances which might, or do arise, "or presume that the testator intended to provide for them, unless we have some evidence that he thought of them."

SECOND.—IF A FEE VESTED IN THE TRUSTEES, THEY COULD NOT MAINTAIN EJECTMENT.

But suppose that a legal fee did vest in the sons-in-law as trustees, what was there to prevent the equitable fee from vesting in the child or children of John M. Barr, at the death of the testator.

Equitable estates vest, are enjoyed, conveyed, and are transferred, as do legal estates; and this by the equitable owner, without the act or intervention of the party holding the legal estate. *Bridges* v. *Bridges*, 3 Ves. Jr. 127; 4 *Kent's Com.* 302, 303; they also descend in the same manner. See *same authorities.*

There is nothing in the law that prohibits the existence of a legal fee in one person, and of an equitable one in another, at the same time. Upon this supposition, the equitable fee, being given in the present tense, "I do *further* give and devise the remainder of my estate in the farm," vested in Mary Jane Barr, on the death of William Barr, Senior. *Findlay* v. *King*, 3 Pets. 376.

Upon her death, it descended to her heirs at law, the brothers and sisters of the testator, the defendants having purchased from the brothers and sisters of Wm. Barr, Senior, hold her title, if our construction of the statute of descents be correct.

Upon this supposition, the suit would be between those claiming the naked legal title, and those having the equitable title and the possession. The will creating the trust, also shows that the trustees were not expected to take possession, but so far as anything is said upon the subject, it expressly provides that the tenants of the equitable estate, are to have the possession. The trust gave no power whatever, unless it be power to call in aid a court of equity to protect John M. Barr and the child, should occasion require it; nothing further.

How then could these trustees, upon the mere naked legal title, without possession or right of possession, maintain ejectment?

If, however, the children of John M. Barr took no estate, legal or equitable, or if, as is claimed by the learned counsel for the plaintiffs, the estate given them, by the will, was a contingent remainder, dependant upon their surviving their mother, as I understand Mr. Andrews and Mr. Hunter to claim, or an executory devise, as Mr. Ewing claims, dependant upon such survivorship, then as the children did not survive, the sons-in-law would take under the residuary clause of the will, and might maintain the suit.

I think I have shown that the legal estate given the trustees, was but for the lives of John M. Barr and Maria, his wife, and that Mary Jane Barr took a vested remainder in fee.

II.

THE FEE VESTED IN MARY JANE BARR HAS NOT BECOME DIVESTED.

If this remainder vested in Mary Jane Barr, has it ever divested, and if so, in whose favor?

I have incidentally discussed this question, and have very little more to say upon it. It could only divest by virtue of some clear provision of the will providing for it; for an estate once vested, so remains and descends in due course of law, unless there be some express provision for the divesting of it. And it must also be clear that the precise case has happened, provided for, or it will not divest.

Foreman *v.* Harrison, 5 Ves. 208.
Smithers *v.* Wellock, 9 Ves. 234.
Sturges *v.* Pearson, 4 Mad. Ch. R. 413.
Brownhead *v.* Hurtt, 2 Jac. & Wal. 463.
Skey *v.* Barnes, 3 Mer. 240.
Fuller *v.* Fuller, 2 Grant, 31.

There is but one contingency stated in the will, by which it could become divested, and that is in the event of John M. Barr dying without issue. As this contingency never happened, the estate remained vested and descended to her heirs under the statute.

Jeffers *v.* Lampson, 10 Ohio St. R. 104.
Forman *v.* Harrison, 5 Ves. 210.
Smithers *v.* Wellock, 9 Ves. 234.
Brownhead *v.* Hurtt, 5 Jac. & Wal. 463.
Skey *v.* Barnes, 3 Mer. R. 340.
Malim *v.* Keighley, 2 Ves. Jr. 335, N. 3.

I had written thus far in my brief, when I received the brief written by Mr. Hunter, and signed Ewing, Hunter and Andrews. Had I seen that brief before I had written mine, it would have saved me some trouble. I have anticipated very much, which I regard as an answer thereto, but, will add the following points and remarks.

First.—That brief, (as do all their briefs), assumes that the estate given to William Barr, James Keys and John B. Enness, as trustees, was a fee. It was much easier for counsel for the plaintiffs to assume this position, than to examine it; for, I feel just as confident as they express themselves, upon the same point, that the will gave them but an estate, *per autre vie.* Indeed in other parts of their briefs, they seem to admit that it was not a fee. But I have said all that I desire to say upon that point.

Second.—This brief, at least the first and other parts of it, admits that the estate granted to Mary Jane Barr, who was living when the will was made, and at the testator's death was a fee. (*See pages* 8 *and* 15). In which case, if it became vested—a point also apparently admitted,—(*see pages* 8 *and* 15), it could not afterwards lapse, and go to the heirs general of the testator, or fall into his residuary estate, or go over to the sons-in-law, unless under some clause of the will divesting the estate upon some future contingency, but it must descend.

The learned counsel must have been familliar with the rule, so long and firmly established in our law, and so well founded in reason, that where a fee has once vested, it shall not divest, except in a clear case; and requiring that the will should clearly define the occasion upon which the estate is to divest, and that the precise case must have occurred before the estate could divest. This rule goes so

far, as not only to require a clear case for divesting, and the precise case to have occurred, but it declares that the estate shall be released from such condition or contingency and become absolute at the earliest possible moment. (*See Fuller* v. *Fuller, and other cases cited on page* 23).

The circumstances under which this estate was to divest, are very clearly stated in the will, and the will also shows clearly enough, that upon no other set of circumstances was the estate to divest. Nothing can be plainer than these words,

> "But should my said son, John M. Barr, die without leaving any issue of his body, *then, and in that case,* I do give and devise the remainder of my estate in the said farm, unto my said sons-in-law, William Barr, James Keys and John B. Enness, and their heirs forever."

It is in that case, "*then* and in *that* case, I do give and devise," etc. Now, can the court add another case, and say that, because the remainder in fee previously vested in Mary Jane Barr, was not to come into her possession until after her mother's death, it was to be divested should Maria Barr die without leaving issue of John M. Barr?

> "If, where nothing is expressed, nothing is to be implied, it would be still more out of the question where something is expressed, to imply more than is expressed." See 16 *Ves.* 512, *n.* 1. 1 *Job & Trat.* 608.
>
> *Expressio unius est exclusio alterius.*

The construction contended for is adding new terms to the will, and making the divesting clause read as follows:

> "But, should my said son, John M. Barr, *and Maria Barr,* die without leaving issue of the body of John

> M. Barr, '*then* and in *that case*' I do give and devise"—a clause most materially different from the clause found in the will.

Every word of this divesting clause is peculiar, and shows that it was only in the very case named, that the estate vested in Mary Jane Barr, was to divest. See how every word of it speaks to this effect.

> "*But should* my said son, John M. Barr, die without *leaving* issue of *his* body, *then* and in *that case* I do give and devise."

Every word of it shows that it was in that very case only, that the estate was to be divested.

The learned counsel would add to the words, "should John M Barr die without leaving issue of his body," the words, "living at the death of Maria Barr."

Now, these identical words, "die without leaving issue of his body," have, after much learned discussion, received a judicial construction in Ohio, and been held to mean without leaving issue of his body at his death.

> Niles *v.* Gray, 12 Ohio St. R. 327.
> Parrish *v.* Ferris, 6 Ohio St. R. 578.

The only other construction ever claimed for these words, "die without issue," or "without issue of the body" (for they mean the same), was an indefinite failure of issue, in which case the devise over to the sons-in-law would be too remote, and would therefore fail. This latter construction was sometimes given these words in England, in order thereby to defeat the tying up of the estate or a divesting clause.

The words, then, "should John M. Barr die without leaving issue of his body," must be held to mean issue living at his death, unless there be some clear and plain

expre sion of the testator to the contrary. Now, there is nothing whatsoever in this will going to show any such intention.

In the desperate struggle to make out such intent, they sieze hold of several circumstances:

First. The words, "upon the decease of Maria Barr," are siezed hold of. These words have nothing whatsoever to do with the subsequent divesting clause. They are words clearly expressive of the time when Mary Jane Barr shall come into full occupancy and possession of the farm should Maria Barr outlive her husband, John M. Barr, and he leave a child. These words *must* relate either to the time of possession and occupancy of the estate, or the vesting of it, and not to the divesting thereof. That they relate to the time of enjoyment, and not the vesting, I have, as I think, fully shown. Precisely such words are used in the same way in many cases, some of which have been before referred to. *See, also,*

Reeves *v.* Trangle, 8 Iredell, 239.
Danforth *v.* Talbott, 7 Ben. Mon. 624.
Doe *v.* Norvell, 1 M. & Sel. 334.
Randall *v.* Doe, 5 Dow. 204.

(*See cases cited on page* 8.)

And cases as "thick as blackberries" could be found, showing that such words did not generally prevent the vesting.

Suppose that no life estate had been given Maria Barr, and that after the description of the life estate given to John M. Barr, the will had read, "and upon the decease of John M. Barr, I do further give and devise the remainder of my estate in the said farm, unto the legitimate child or children of John M. Barr, and their heirs forever."

Now, would it be pretended that the words, "and upon the decease of John M. Barr," indicated that the es-

tate should not *vest* in such child or children until his death? Or, suppose that the estates for life, instead of being given to trustees, had been directly given to John M. Barr for life, and after his death, to Maria Barr for life, if she survive him, and "upon her decease, then to the child or children of John M. Barr and their heirs," could there have been any doubt, whatsoever, that the estate in the children of John M. Barr, would have vested upon the death of Wm. Barr?

The will, as drawn, with reference to this question, in legal effect, is precisely what it would have been in the cases supposed.

Second. Because John M. Barr was intemperate, the legal title for life is put in the trustees for the use of the life tenants, instead of being placed directly in them, and the remainder of the legal estate devised to the child or children of John M. Barr. As the use was only for the life estates, it attached to the legal title no further.

If any regard is to be paid, either to general principles, or to specific cases, in reference to the vesting of estates, the estate would most certainly vest, on the death of the testator.

The giving the life estate to Maria Barr, in case she survive John M. Barr, does not in any way change the will in this respect. It only puts off the full possession and enjoyment of the farm for another life. But neither of the expressions postpone the vesting of the remainder.

Third. It is also assumed in this brief, and in the briefs written by Mr. Andrews, and by Mr. Ewing, that there was a general intent of the testator, to which the particular intent must yield, and that this general intent divested the estate, in case there were no issue of John M. Barr, at the death of Maria Barr.

I admit that the rule referred to, holds at times in relation to wills.

But where is the general intent which prevents the vesting of the estate in Mary Jane Barr, if she die before her mother, or which adds to the words in the divesting clause, "but should John M. Barr die without leaving issue of his body," these words, "living at the death of Maria Barr," and thus changing the statutory construction of these words? For, plaintiff's counsel do thus attempt to change the statutory construction of these words in Ohio, and principally they claim that there is some general intent of the will requiring it. Where, I say, do they find this general intent?

It is said to be found, in the fact that the testator has given the farm to John M. Barr for life, with remainder in fee to his child or children, with a divesting clause, "that should John M. Barr die without leaving issue of his body, then, and in that case," he had devised it to the sons-in-law. There is nothing else in the will, unless it be the general residuary clause, which evidently did not refer to this farm, which had previously been given away. Now, how does the above arrangement show that he intended that this farm should go to the sons-in-law, if John M. Barr did leave issue? And in endeavoring to establish this general intent, they not only run counter to the rules relating to the vesting and divesting of estates, but they set aside the usual and legal meaning of the word, heirs.

They narrow down the estate given Mary Jane Barr, to something less than a fee. In so doing, they not only run counter to many decisions upon the precise case, but to what Mr. Wade intended, when he drew the will, and withdraw the admission made on page 3 of their brief.

Nothing whatsoever is provided in the will, that has, or can have any reference to this farm, that shows any such

general intent. All we have, is this, that after giving a vested fee to the children of John M. Barr, he provides for the divesting of it *on a given contingency*. The residuary clause was evidently intended to cover "the remainder of his estate, both real and personal." Having given away the farm, he disposes of the rest of his estate. Nothing can be gathered from this clause, more than, that having made every disposition of the farm which he desired to make, he was content to give the rest of his property to his sons-in-law.

Judging of this will, from the facts before us, as relating to his family and property, it is clear, that having made large advances to his daughters (all he intended they should have of his estate), and having, by this very will, left to each one of the sons-in-law as much as value of this farm, he intended the farm to go to John M. Barr's family, and, therefore, vested it in his children. This is all the general intent that can be gathered from the will and the surrounding facts, relating to his property and family.

There is not the slightest evidence that he contemplated the death of his son with children living, who should die before their mother, and to provide for a divesting of the estate in favor of these sons-in-law, upon *that* contingency. That idea is excluded by the provision that he did make, in reference to the divesting of the farm in favor of these sons-in-law, "in case John M. Barr died without leaving issue of his body." "If, where nothing is expressed, nothing is to be implied, it would be still more out of the question, where something is expressed, to imply more than is expressed."

How easy to have used these words in place of those he did use, if he had contemplated that, and had so intended, to-wit: "in case John M. Barr and Maria Barr, die without leaving issue of the body of John M. Barr."

As he could not foresee the future, or who would be Mary Jane Barr's heirs, when she should die, he was willing to let the estate vested in John M. Barr's children, take whatever course they might take with it, or the law might provide, after John M. Barr should die. The death of John M. Barr he did contemplate, and a contingent disposition of the estate at that time, he contemplated. He contemplated his death without leaving issue, and he provided in *that* event, that if he left issue, then Maria Barr should have a life estate out of the estate vested in her children. If he did not, the estate "then and in that case" should go to the sons-in-law.

This is all that there is showing that the testator pursued his estate beyond his death, or thought of other contingencies. There is no general plan, or peculiar provision, showing any such intent, as in the cases cited by Mr. Hunter from 4 *Paige*, 10 *Ohio St.*, and from 3 *Mylne & Craigs*; or as was provided in *Brewster* v. *Benedict*, 14 *Ohio*, 369 to 374, and in other cases cited. And the fair presumption from it all is, that feeling that he could not penetrate "the mazy and uncertain future," he was content, like Lord Mansfield, to leave the estate vested in John M. Barr's children, should they survive their father. A few sentences of the opinion of the Supreme Court of Pennsylvania, in *Fuller* v. *Fuller*, 2 *Grant* 30, are much in point.

> "Much of the argument of the plaintiff in error, is founded on facts apparently important, but not appearing in the case stated; much of it in difficulty, by possibility to arise out of the construction given to this will in the Common Pleas, *difficulties against which we can not presume that the testator intended to provide, unless we had some evidence that he thought of them. Perhaps he never thought of the mother outliving any of the children.*"

Joffee v Lampson. 10 Ohio St. R. 105

These remarks apply well to the arguments of plaintiff's counsel, for where is there a scintilla of evidence in this will, that the testator contemplated that Maria Barr should outlive the children of John M. Barr, and that he intended to provide, *then and in that case*, that the farm previously vested in John M. Barr's children, should divest in favor of the sons-in-law? There is none, so far as we can judge from the will, and especially upon the theory of the plaintiffs, that he did not intend the estate to vest until the death of Maria Barr. The evidence is directly the other way. He provides that the estate shall come to the possession of the children on the death of Maria Barr, as though he contemplated them to live. Nor does his language express a condition. He does not give it to them, *if* they survive Maria Barr, nor the estate over to the sons-in-law, *if* they do not. Their not surviving the mother, and the disposition of the farm in *that* case, it does not appear that he contemplated, and therefore, it is not proper for the court to contemplate this state of facts, or construe the will with any reference them.

Stanley *v.* Stanley, 16 Ves. 512, n. 1.
Brewster *v.* Angell, 1 Jac. & Wal. 608.
Nash *v.* Smith, 17 Ves. 33.

Fourth. The counsel for the plaintiffs having so little in the will, base themselves upon general principles of human nature, and they argue; is it possible that Wm. Barr intended that, in case his son's issue should die before Maria Barr, that the estate should go to his own brothers and sisters, not of his blood, instead of going to his sons-in-law, *of his blood? Pray, when did they learn that his brothers and sisters were not of his blood, and that his sons-in-law were?* Or, that he contemplated where the estate would go, with reference to multiplied facts and cir-

cumstances that might be presented? Or if he began to contemplate thus far into the future, that it did not occur to him that his sons-in-law were *not* of his blood, and might marry again, or convey the estate from his blood, or die and leave it to children of another marriage. Surely if he undertook to look thus into the future, among the innumerable contingencies that he might contemplate in reference to his family, *these* were likely to present themselves, and to lead him to think that Mary Jane Barr and her issue would probably outlive his daughters and their issue, and that it was wisest and safest to vest the estate in John M. Barr's children, *and there leave it*, unless John M. Barr should die without leaving issue. The residue of his estate he gave to his sons-in-law, *and there he left it;* and as that was to each of them as much as the then value of this farm, and having provided that in case John M. Barr should die without issue, then the same should vest in them, why should we suppose that he was not willing and anxious to leave this farm in the family of his son, if he died leaving issue? He did not give it to his son, because, as is supposed, he was intemperate. He unquestionably would have left it there, except for the habits of his son. If he had done so, it would have vested in Mary Jane Barr on his death, subject to Maria Barr's life estate. Mary Jane Barr was living, and he could vest it in the manner he did, and thus, in all probability, it would remain for years in his family. He has not got up any scheme or general plan of a will, as was the case in *Brewster* v. *Benedict*, and in *Re Sanders*, 5 Paige, and in *Evens* v. *Stevenson*, 10 Ohio St. R., and in the other cases cited by Mr. Hunter; nor has he ventured far into the uncertain future: and nothing could be more foreign to all legal principles, than for the court to find any intention not clearly expressed in this will, as to such future contingencies. And

yet it is upon such general principles, relating to the human affections, that the argument of the plaintiffs is based.

Of all wills that were ever written, this is the last upon which the court should apply such general reasoning. The testator has actually held out an inducement of one thousand dollars, as a special premium for Maria Barr to marry again, and put a step-father and his children, not of his blood, over Mary Jane Barr, of his own blood.

We say that these general principles, applicable to the affection and to testamentary dispositions, if they could be considered, would vest the estate in Mary Jane Barr, his grand-daughter, (where it clearly is vested upon every principle applicable to estates by will), rather than in the sons-in-law. But it is evident that the whole law relating to wills would be overturned, if from such general reasoning a "general intent" could be established, to control the special provision of the will.

(*See cases cited on pages* 32 and 33 *of this brief.*)

That he did not intend that this farm should pass to his sons-in-law, should Mary Jane Barr outlive her father, and should then die without issue, is perfectly clear from this consideration: *he made no provision that would accomplish this purpose, even upon the construction contended for by the plaintiff's counsel.* He could not foresee that Mary Jane Barr would not outlive her mother, and if she did, it is admitted that the estate would not only vest, but she would come into actual and full enjoyment of it. Now, suppose she had outlived her father and mother, and then died without issue, leaving her uncle and aunts. It is admitted by all the distinguished counsel that the estate would have vested in her in that event. Is there any divesting clause that would have carried this farm to these sons-in-law? This shows clearly that he had no purpose or intention to preserve this farm to his sons-in-law or

daughters, should Mary Jane Barr die without issue. It shows clearly that he did not follow the matter or intend to follow it, (as he did not the legacies given the sons-in-law), beyond the death of John M. Barr. It negatives the idea that he did not intend to vest the estate in Mary Jane Barr and her heirs, if she outlived John M. Barr; for, had he intended that this farm should pass to his sons-in-law, should Mary Jane Barr die without issue, a few words would have expressed such intent, and would have been used. Instead of the divesting words which he did use, "but should my son, John M. Barr, die without leaving issue of his body, then and in that case I do give and devise," he would have written, "but should the child or children of John M. Barr die without leaving issue of their bodies, *then* and in *that* case I do give and devise."

This would have shown such intent. But the words he does use, actually exclude the idea of any such intent.

Fifth. The word "heirs," as connected with the estate in the children of John M. Barr, they claim, is to be understood to mean, "issue."

(*See page* 24 *of Mr. Hunter's brief.*)

There is nothing in this will clearly showing, or showing at all, that the testator by the term "heirs," in connection with the estate of the children of John M. Barr, meant issue simply, or intended to cut down their estate, so that they could not sell it or will it away before Maria Barr should die; in other words, cut it down to an estate tail. Now, although estates by will, given to a man and his heirs, have sometimes been cut down to estates tail, by the provision that if the devisee die without children or issue, then over, yet it has been generally in cases where the conveyance over was to some person who was an heir, thus clearly showing that the term heirs was used in a restrictive or narrow sense.

This is true of the cases following, cited by the learned counsel:

In the matter of Sanders, 4 Paige, 295.
Stephenson *v.* Evans, 10 Ohio St. R. 308.
Brewster *v.* Benedict, 14 Ohio, 369.

In each of these cases there was a long and complicated will, in which the scheme or intent thereof, clearly showed that the estate, although described as a fee simple, was not such.

In the case of *Stephenson* v. *Evans*, there was a distinct declaration that,

> "In default of children lawfully begotten of the bodies of each, then the estate should not descend nor pass according to any law regulating descents, but shall remain subject to the following *contingencies*, and be disposed of in the manner following; that is to say, should either of my said grandsons die without having heirs lawfully begotten of his body, the survivor or his heirs, lawfully begotten of his body, shall inherit the position of the one so dying without such lawful heirs."

In this case it was clear, that there was no intent to convey a fee simple, for the reason that the property was not to descend according to any law of descents. And it was further provided, that if any one of the grandchildren, to whom the fee in terms had been given, should die without leaving heirs, lawfully begotten of his body, that then the same should go to the grandchildren, who were heirs of those so dying, thus showing in the clearest possible terms, that the term "heirs," meant issue, and could mean nothing else. And this case was determined principally, with reference to another well-settled maxim of law, to-wit: when there may be two constructions of any written in-

strument, the one of which would make it void or defeat its purpose, that construction shall be adopted that sustains the instrument. *Pruden* v. *Pruden*, 14 *Ohio St.* 254.

Now, the devise of William Barr to the sons-in-law, should John M. Barr die without any issue of his body, was to persons who could in no event be heirs of John M. Barr, or of his children, nor would he be their "ancester" under the statute of descents. *Birney* v. *Wilson*, 11 *Ohio St. R.* 433.

In all this class of cases, there is something distinctive and positive in the will, which shows clearly that the word "heirs" was not used in its usual, natural and legal signification, but was used in a restrictive sense; and generally they are so used, that the restrictive words attach themselves to the word heirs, as words of limitation, and do not appear to be words of purchase, intended to defeat or divest an estate already vested, and to carry it over upon some occurrence or contingency, to other parties. On the other hand, there are many cases where the language and terms used in this will, have been used, and the attempt has been made to reduce the word "heir," to issue, and the estate to something less than a fee, but the attempt has failed. See

Fells *v.* Brown, Cro. Jas. 591.
Porter *v.* Bradley, 3 T. R. 146.
Doe *v.* Frost, 3 Barn. & Ald. 555.
Richardson *v.* Ayres, 2 Mass. 62.
Ex parte Davies, 9 Eng. L. & E. 91.
Abbott *v.* Essex Co., 18 How.
Roe *v.* Jeffrey, 7 T. R. 596.

At least, five of these cases, were familiar to the profession, when William Barr's will was written, and familiar to Mr. Wade; and the terms used by him seem clearly to indicate that he prepared it with direct reference to these and other authorities cited. They fully show that the estate given by that will was not a fee upon a condition, or

an estate less than a fee, but an absolute fee, subject only to be defeated upon the *very* contingency provided for defeating such fee. And these and other cases show most clearly, that the estate is to be defeated, only upon that very condition provided, and that all this class of clauses, going to defeat an estate vested, are to be construed with great strictness.

Harrison *v.* Foreman, 5 Ves. 208.
Doe *v.* Perryn, 3 T. R. 493.
Smithers *v.* Willock, 9 Ves. 234.
Sturges *v.* Pearson, 4 Mad. 413.
Brownhead *v.* Hunt, 2 Jac. & W. 463.
Skey *v.* Barnes, 3 Mer. 240.
Henry B. Chew's Appeal, 45 Penn. 232.

Sir Richard Pepper Arden, in the case of *Harrison* v. *Foreman*, sums up the whole in these few words:

> "It is perfectly clear, that where there are clear words of gift, giving a vested interest to parties, the court will never permit that absolute gift to be defeated, unless it is perfectly clear, that the very case has happened, in which it is declared that interest shall not arise."

It is also held, that the word "heirs," when used, as in this devise to John M. Barr's children, is only to be thus restrained, except in a clear case.

Mr. Justice Elsworth, in speaking upon this point in Gold *v.* Jordan, says:

> "But evidence of such intent must be clear and decisive, or we can not admit it to have such an effect. We are bound to suppose the testator used language in its usual and legal sense; and a devise to the heirs of a person *generally* does not mean *some* of them, but *all* of them." 21 *Connt.* 625.

This rule does not apply to estates in trustees, for as

these estates are so placed in them for the benefit of the trust, *that* is to be looked to for the continuance and nature of the estate, rather than to the words of limitation. *Lewin on Trusts*, 238.

Sixth. Nor are the terms, "children of John M. Barr and their heirs" in the vesting clause, synonymous with words, "issue of the body of John M. Barr," in the divesting clause.

The word issue, is ambiguous, and is generally understood to include all lineal descendants, as children, grandchildren, and great-grandchildren.

Earl of Oxford *v.* Churchill, 3 Ves. & B. 67.
Freeman *v.* Parsley, 3 Ves. & B. 423.
Davenport *v.* Hanbury, 3 Ves. 259.
Wythe *v.* Blackman, 2 Ves. Sr. 201.

And although the word children may be taken to mean grand-children,

(Wythe *v.* Thurston, 2 Amb. 555.
Gale *v.* Bennett, 2 Amb. 681.)

yet it is only in a case where such extended meaning, is clearly shown by the context of the will. It is not the usual or ordinary meaning attached to it in wills.

2 Jarman on Wills, 69.
Crooke *v.* Brookeing, 2 Vern. 108.
Boyle *v.* Hamilton, 4 Ves. 439.
Lier *v.* Parnell, 1 Edw. R. 356.
Radcliffe *v.* Buckley, 10 Ves. 195.
Earl of Oxford *v.* Churchill, 3 Ves. & B. 59–67.
Reeves *v.* Brymer, 4 Ves. 698.
Cutter *v.* Doughty, 23 Wend. 522.
Dickinson *v.* Lee, 4 Watts 82.
Mowatt *v.* Caron, 7 Paige 332.

Sir RICHARD PEPPER ARDEN, in the case of *Reeves* v. *Brymer*, 4 *Ves.* 698, says:

"Children may mean grandchildren where there can be no other construction, but not otherwise."

Sir WM. GRANT, in *Radcliffe* v. *Buckley*, 10 *Ves.* 201, says:

"It was not contended that the description 'children,' ordinarily and properly speaking, comprehends grandchildren. It was decided in the case referred to, *Crooke* v. *Brookeing*, that if there were children, grandchildren could not take with them a legacy given to children. The decision of the Lord's Commissioners in that case was approved by Lord Northington in *Hussey* v. *Dillon*, and was not disputed by Lord Hardwicke in *Wythe* v. *Blackman;* and Lord Alvanley's declaration, that 'children' may mean grandchildren where there can be no other construction, but not otherwise, is consistent with, and founded upon, that case."

Mr. JARMAN opens his chapter on this subject with this language:

"The legal construction of the word *children* accords with its popular signification, viz: as designating the immediate offspring; for, in all the cases in which it has been extended to a wider range of objects, it was used synonymously with a word of larger import, as issue." 2 *Jarman on Wills*, p. 69.

And Chief Justice COWEN, in *Cutter* v. *Doughty*, 23 *Wend*, p. 522, says:

"And in several cases it is agreed that, to warrant a departure from the clear and settled meaning of words, there must be either such strong necessity, or at least a clear explanation. A devise to the children of A. shall not let in his grandchildren, though A. had only one child and several grandchildren. *Cooke* v. *Brookeing*, 2 *Vern*, 106. This case has often been approved. *Radcliffe* v. *Buckley*, 10 *Vesey*, 106. Here the Master of the Rolls recognizes what Lord Alvanley said in a previous case,

Reeves v. *Brymer*, 4 *Ves.*, 698, viz: that children may mean grandchildren where there can be no other construction; but *not otherwise*. The remark may be too strong for a case where you are searching out a secondary meaning, on the face of the will; but there is no case which warrants us in taking up such a meaning where the primary sense may be literally satisfied, and there is nothing in the will to raise any thing more than a doubt."

And the MASTER OF THE ROLLS, in the case of *The Earl of Oxford* v. *Churchill*, 2 *Ves. & B.*, p. 67, says:

"Issue is an ambiguous term. It may mean, and frequently does mean, children only; it may mean all descendants. * * * * * * *
It would be against all rules of construction to control the operative and effective part of a clause by ambiguous words occurring in the introductory part of it."

There are very many authorities to the same effect.

If the law favors the vesting of estates, and does not favor the divesting of them, it would seem quite clear that there should be something in the will very indicative in that direction before unambiguous terms, such as "children of John M. Barr and their heirs," should be narrowed down to something less than their ordinary and usual signification, by the use of ambiguous words, such as, "should John M. Barr die without issue of his body," used in the divesting clause.

Seventh.—The learned counsel do not seem to agree precisely as to the nature of the estate given the sons-in-law, or altogether, to agree whether Mary Jane Barr took a vested fee or not. They all *hope* that the estate given Mary Jane Barr will be found to be a contingent remainder, although they intimate that it is quite immaterial to

them, whether it be vested or not. *See p.* 16 *of Mr. Andrews' Brief.*

Mr. Hunter intimates that it may be a fee vested, but subject to a condition subsequent, (*see page* 17), whereas, Mr. Ewing thinks *it an executory devise. See page* 35. They also *hope* that the estate given to the sons-in-law, may be some kind of a remainder, but are not certain what it is. Mr. Hunter says that it is very difficult to say what it is. *See page* 9. He thinks the estate may be either an executory devise or a contingent remainder, with a double aspect, (*see pages* 6 *and* 9), or a devise which has lapsed, and therefore falls into the residuary clause. *See pages* 16, 17 *and* 18. Mr. Ewing is uncertain what it is. He says that if the sons-in-law took the remainder, they took it as alternates, and the devise to them operated only upon the use, as the fee was already vested in them. *See page* 35. How operate upon the use which expired when the life tenants died?

I think, with Mr. Hunter, that it is unnecessary to decide all these questions, (*see page* 16), upon so simple a will, especially as there are a few well-settled rules of law, which made the estate first given William Barr, James Keys, and John B. Enness, *in trust*, but a life estate, and the estate to the children of John M. Barr a vested fee; and the estate to the sons-in-law, a clear case of an executory devise, it being a fee depending upon a contingency which should defeat a prior fee in the children of John M. Barr. Where there is such uncertainty among the learned counsel, it seems to me to be the precise case, where upon general principles, the estate should vest.

Eighth.—As much is said or intimated as to the estate of Mary Jane Barr being a conditional, qualified, or base fee, subject to a condition which should defeat it, I will quote a short sentence from *Johnson* v. *Valentine.*

> "Courts always lean against construing *provisions* as *conditions*, when the intention of the testator does not require them to do so. If violence is not done to the meaning of the testator, they prefer that the estate should vest at once."

And also a few sentences from *Fuller* v. *Fuller*, 2 *Grant* 31:

> "We think the court put the right construction upon this will. It has the weight of authority in its favor. It avoids the fault of converting an express fee simple estate into a life estate, or an estate tail by implication. * * * * It follows the rule that that construction ought to be favored that makes an estate vest absolutely at the earliest possible period."

Ninth.—The learned counsel in their briefs intimate that there is something peculiar in the law of Ohio in reference to the rule that the intention of the testator is to be observed. They refer to a remark of Judge Hitchcock, upon the decisions of the English judges, and those of the other States of this country, in their application of the rules of construction. If this remark was not a hasty one, it shows him to have been less conversant with these decisions than he should have been.

There is nothing whatsoever peculiar in the law of Ohio, upon these points. It is no more the law of Ohio, that the intention of the testator is to govern, without regard to mere technical words, than it is, and has been the law of England, or of the other states of the Union. Nor does the law in England, or the other states of the Union, lean more strongly in favor of the vesting of estates, whenever, and so soon as they can vest, than does the law of Ohio. Indeed, the tendency of the decisions in Ohio, is very de-

cisive in the same direction. *Jeffers* v. *Lampson*, 10 Ohio St. R. 104; *Drake* v. *Rogers*, 13 Ohio St. R. 30.

All the general principles cited in the first part of this brief, which favor the vesting of estates, are good law in Ohio, and so are the authorities cited herein; and so are these against the divesting of such estates. All the reasons for the one and against the other, are as strong here, indeed, stronger than they ever were in England.

Against the somewhat *ad captandum* remark of Judge Hitchcock (and which has not received the assent of the Bar or Judges of Ohio), I quote the following, taken from the opinion of Lord Broughman in the case of *Phipps* v. *Ackers*. Speaking upon this very question of the vesting of estates under wills, and of the rules and cases relating thereto, he says:

> "It is of the most essential consequence, that the doctrines which have been long received for law, and acted upon by the courts in their decisions, and by parties and their professional advisers in the disposition of property, should not be shaken."

9 Cl. & Fin. 598

When Mr. Wade, who was a lawyer, drew Wm. Barr's will, these principles and decisions were in his mind, and he drew it with reference to them; and to pass upon this will without regard to these rules and decisions, would be to disregard his intention as therein expressed.

My associate, Mr. Pugh, informs me that he has examined the original will on file, in the probate records of Hamilton county, and that it is in Mr. Wade's hand writing; Mr. Wade was a witness to it.

The parties who have purchased this farm, have done so upon the opinion of most learned counsel, who had regard to these principles and decisions, and now to pass them by, would be a most gross disregard of the principles of

law, relating to the security of titles, and the protection of parties claiming estates under wills.

And in this connection, I will, in closing this part of the brief, quote from the opinion of Chief Justice Marshall, in deciding the case of *Danforth* v. *Talbott*, 7 Ben. Mon. 625.

> "This question has been considered both with reference to the evidences of intention to be gathered from the provision and language of the will, and to the effect which has been given, by adjudged cases, to particular expressions used by the testator. The great object being to ascertain and effectuate the intention of the testator, his language used for the very purpose of conveying that intention, furnishes, of course, the appropriate and peculiar means of ascertaining it. But, besides the resort to rules of construction, for interpreting the intent of particular words or clauses, *the certainty and uniformity which should prevail in the modes of creating estates, and in the rules applicable to them*, seem to require that, when a will is found to use words and phrases, ordinarily used in the creation of estates, and which, by the course of judicial decisions upon wills, have received an established interpretation and effect, these decisions may not only be resorted to, but should be adhered to in their application to the particular case, unless the obvious intention of the testator would be violated by so doing. Such decisions being themselves presumably founded on an ascertainment of the meaning of the particular words or phrases, and of the intention with which they were used, and being directed to the effectuation of that intention, according to the rules of law, *become in point of reason, as well as of law, legitimate sources of exposition.*"

This is as true in Ohio as in Kentucky. It is good sense and good law every where, and is applicable to this

case, and the briefs of the learned counsel. It applies to the word "heirs" in connection with the estate given to Mary Jane Barr. Mr. Hunter would restrict and limit the meaning of the word in that connection, whereas the books give to it, in such a connection, the usual and legal meaning. It also applies to the use of this same term, and in connection with the trust estate, for as such estates are given for the sole benefit of the *cestui que trust*, the courts look rather to the purpose of the trust to ascertain the nature and limitation of the estate, than to technical words. It did not seem to occur to Mr. Hunter, that the term "heirs," as connected with the estate given the trustees, could be thus restricted; whereas, it is very clear, upon the unbroken current of authorities, and upon general principles, that an estate given to trustees in the terms of this, creates but a life estate.

It applies to the words upon which the estate to Mary Jane Barr is to divest, and pass to the sons-in-law, "but should John M. Barr die without leaving issue of his body," for these have received a judicial construction in Ohio, and it has been determined that they mean issue living at the death of John M. Barr, so that, in this connection, they convey the estate to the sons-in-law, only in case he die without leaving issue of his body. And the words, "and upon the decease of John M. Barr," and like expressions, have every where, for the last hundred years, by an unbroken series of decisions, received the construction that, whenever it could be done, without doing violence to the expressed intention of the testator, they should be held to postpone the possession and enjoyment only, and not the vesting of the estate. And these authorities, not only were received as such, in Ohio, at the time this will was written, but are such at the present time in Ohio. See

Jeffers *v.* Lampton, 10 Ohio St. R. 114.
Niles *v.* Gray, 12 Ohio St. R. 330.
Stephenson *v.* Evans, 10 Ohio St. R. 312, 315
Moore *v.* Beckworth, 14 Ohio, 137.
Pruden *v.* Pruden, 14 Ohio, 255.

The idea that we are now to adopt new definitions of words and legal phrases, which were well and familiarly known at the time this will was written, and to disregard the unbroken current of authorities, and the general principles upon which estates by will, have been deemed vested, and indeed the controlling element of the law upon the subject of wills, should receive no countenance from this Court.

The learned counsel have found one or two cases, which they say, are like the present, and which they think favor their views. I do not think they do, nor do I believe they can find a case at all like this, that favors their construction of the will. If they could, such case would have no effect in breaking in upon such sound general principles, and the long list of authorities, which favor the vesting of this estate in Mary Jane Barr, at the very earliest possible time, and the earliest release thereof from the contingency that might divest it.

Tenth.—But the learned counsel say that the words of this will "upon the decease of Maria Barr" have been considered by the Supreme Court of Ohio, and that that court held them to be expressive of a condition, sending the estate to the child or children of John M. Barr, and to take effect only in the event of such child or children surviving said Maria Barr. Reference is made to the case of *Bigelow and wife* v. *William Barr*, 4 *Ohio*, 366. One or two remarks will dispose of this:

1*st.* There is no opinion that indicates any such thing.

2*d*. If there was, it could have no proper influence upon this court in this case. The only question involved in that case, was, whether Maria Barr took a life estate in the farm. Nothing whatsoever was involved in relation to the fee, or estate in the children of John M. Barr, or as to the remainder. The case called for no examination of this point, and none was made, and no opinion given, nor was there, in my opinion, the slightest intimation, which could be taken as expressive of such an opinion. It was not like the opinion of Judge Johnson in the case of *Morgan* v. *Enness*, where the very question was involved. *See printed pamphlet, p.* 27. There the very question was involved, and a construction of this will upon this point was had. This was the only judicial construction of this will that has been had, and it was in direct opposition to the position of the learned counsel.

Even if there had been an expression of opinion in the case of *Bigelow* v. *Barr*, this court, under the circumstances, will pay very little regard to it, as it was not involved in the case, and as the United States Courts are not bound by the decisions of the States upon general questions of this kind. See

Lane *v.* Vick, 3 How. 476.
Swift *v.* Tyson, 16 Pets. 18, 19.
Foxcroft *v.* Mattell, 4 How. 379.
Williamson *v.* Suf. Ins. Co., 3 Swan R. 276, 277.
Daley *v.* James, 8 Wheat. 535.

The same parties were not before the court, nor the same questions involved. It would be much more in accordance with the principles upon which the court acts, in such cases, to follow the published opinion which learned counsel, from time to time, have given parties desiring to purchase, and the opinion of Judge Johnson, given in the case

of *Morgan* v. *Enness*, where the question was raised and passed upon.

Jackson *v.* Chew, 12 Wheat. 167.
Waring *v.* Jackson, 1 Pets. 715.
Phipps *v.* Ackers, 9 Cl. and F. 538.
The Union Ins. Co. *v.* Hoge, 21 How. 66.
McKean *v.* Delaney's lessee, 5 Cr. 32, 33.

In the two cases last cited, the Supreme Court of the United States acted upon other evidence than the decisions of courts as to the law of the States. *See quotation from Lord Brougham's opinion, p.* 84. I was somewhat surprised at this position, but this and the other various opinions, taken by the very learned and able counsel, only goes more strongly to show that this is no case of a contingent remainder in Mary Jane Barr, or of a divesting of the estate vested in her. I think the learned counsel would not be driven to their varied positions, if they had the clear case required to prevent the vesting, or to effect the divesting, of the estate.

Eleventh.—The learned counsel, in their brief written by Mr. Andrews, take the position that the fee given to the children of John M. Barr, was a conditional fee, or such a fee that there was a reversionary interest left undevised to them, and which, either descending, under the residuary clause, or was devised over. *See page* 13. This view results from a very singular construction, which they put upon the statute of descents of Ohio, changing the meaning of the plainest language, and the clearest provision of statutory law, and adding conditions thereto, from considerations of natural equity. *See page* 7. I shall not undertake to follow this metaphysical and somewhat shadowy position, but will make two very simple replies thereto.

1*st*. This statute is so clear and plain in its terms, that there is no reason for construction. The very first

principle of construction applies to it, that that which is so clear as to need no construction, shall receive none.

2*d*. The question, as to the estate given to the children of John M. Barr, must be decided by virtue of the will alone, and upon that there is no room to doubt that it was a fee.

In the case of *Collier* v. *Collier*, 3 *Ohio St.*, 373, referred to by counsel for plaintiff, the court says:

> "It is a settled rule of construction, that a testator is never presumed to intend to die intestate, as to any part of his estate, to which his attention seems to have been directed, and a court of equity will put such a construction upon equivocal words as to prevent such a result. *Maberly* v. *Strode*, 3 *Ves.* 450; *Booth* v. *Booth*, 4 *Ves.* 403."

If there could be any doubt upon the words of the will, this rule of construction, adopted by the courts of Ohio, from the English decisions, would seem to be decisive. The counsel in this position, bring in aid, their construction of the statute, and make the estate given by the will, depend upon subsequent contingencies, not forseen or expressed. According to this view of the law, it is impossible for children to take an absolute fee in Ohio from an ancestor, either by deed of gift, demise, or by descent, unless they deed or will it away. This is certainly a new idea, if not an ingenious one.

Twelfth. The plaintiff's counsel put into the case, the records in the case of *Adam Moore* v. *John B. Enness*, and the other plaintiffs, and *Ephraim Morgan* v. *The Same*, parties. These suits were commenced in 1847. None of these defendants, except Morgan, in his case, and Moore in his, were parties to these suits. Nor were any of the persons, from whom Morgan's title came, parties thereto. A part of the

title of the defendants has since come from Wood, and if it were important, the defendants could stand upon the record title to Wood, as they have since purchased.

Patrick Considine had received his title for 75 acres before these bills were filed, and so had Adam Moore, to 25 acres. A part of Considine's title is held by some of these defendants. The parties to these suits, were, therefore, not the parties to this suit; so that, for these reasons, these proceedings could not have operated as estoppels, no matter what had been the result of them; and so can not operate for the further reason, that no issue was necessarily involved, and no result had to make them so operate.

Estoppels are said to be odious, and though this rule may not always apply in its full force to equitable estoppels *in pais*, and estoppels arising from a trial or hearing, the courts are very cautious in applying them, and require substantially the same parties and the precise question to be involved in order that a record may estop.

W. A. & G. St. P. Co. *v.* Sickles, 24 How. 342.
Howlet *v.* Tarte, 100 E. C. L. 826.
Outram *v.* Moorewood, 3 East, 346.
Vooght *v.* Winch, 3 B. & Ald. 662.

And it is certain that the question involved in this suit, was not necessarily involved in the dismissal of these bills. They were bills in the nature of bills *quia timet*, and might have been dismissed: 1st, for want of prosecution; 2nd, because the necessary parties to such a proceeding to make it effective, were not all before the court. Morgan had not the whole title of the brothers and sisters of William Barr, Senior, and not one of them were before the court. Nor were all the heirs of Enness, Keys and Barr in the case, and for that reason the court might have dismissed it; and 3rd, they might have dismissed it, because

there was no immediate ground for fear, whatsoever, and the court would not anticipate questions and dangers, that might never be presented. The only parties answering, disclaimed any intention to disturb the plaintiffs: no adverse title was insisted upon. This, in fact, was the ground upon which the bills were dismissed. 4th. A general dismissal of a bill where the record does not show that it was upon the merits, never concludes by way of estoppel. *Louderback* v. *Collins*, 4 Ohio St. R. 261; *Lore* v. *Truman*, 10 Ohio St. 54. Much less does it conclude, if the dismissal be without prejudice as it was in this case, as to all except John B. Enness, who put in as a defense that he did not threaten to disturb said Morgan in his possession, and set up no adverse title. No one disputed Morgan's title for Maria Bigelow's life, but claimed that there was no ground for such a suit; and it is known that the court finally dismissed the bill on this point, without going into the questions involved in the merits. 5th. The case was disposed off without prejudice, except as to Enness; and as to him, there was no hearing upon the evidence; and as he had disclaimed any purpose of disturbing Morgan, and insisted that so long as Maria Barr lived, no one could disturb him (and no one then could tell how long that would be), and as the court decided that under these circumstances, the law did not require interference, the record could not estop, if it had not been without prejudice; because, a simple determination of a point of law by the court in one case, can not, as a general rule, estop a party in another case. Parties may sometimes be estopped in another case, by their own acts, or doings, or by the contestation and finding of the precise *fact;* but not by the ruling of the court in the one case. There may be cases, where the parties come into the court or the very purpose of obtaining a determination of a legal

question, where the same parties might be estopped from again raising that question; as where they go into court to determine a question of law, upon which their title depends, and *there is a proper issue made up for that purpose.* But they can not be estopped upon the simple determination of a question of law arising in the case: for, if so, the court could not review in one case, an erroneous opinion pronounced in another.

Stevens *v.* Dunbar, 1 Blackf. R. 56.
Lampin *v.* Kedgewin, 1 Modern, 207.
Kendall *v.* Talbott, A K. Marshall R. 321.
Hughes *v.* Alexand, 5 Duer. 491.
Outran *v.* Morehead, 3 East.
Howlett *v.* Tarte, 100 E. C. L. 625.
Sickles *v.* W. A. & G. St. P. Co. 24 How. 343.
Bernard *v.* City of Hoboken, 3 Dutcher, 412.

The records therefore can not be received by way of estoppel.

Nor could they be received as notice to Patrick Considine, and those claiming under him, for his title is many years prior to these suits, and that is true of other defendants. Counsel have not in their briefs stated the purpose for which they introduce these records, or what they claimed for them, and therefore I shall say no more upon this point.

Thirteenth.—Iwould call the attention of the court specially to the transcripts from the Probate Court, the mortgages to Sandige, and the deeds of conveyance from Wm Barr to persons in Shippensburgh. These all prove the advancement to the daughters: and the mortgage to Sandige of property in Shippensburgh speaks of it as property devised to them by the will of Wm. Barr, thus recognizing the idea that it was real property conveyed to them by the residuary clause of this will.

These facts with the age of William Barr, Seinor, and

of Mary Jane Barr, his grand daughter, and the intemperance of John M. Barr, with the fact, that this will was written not by William Barr when *inops consellii*, but by counsel learned in the law, are all important for consideration by the court, especially when taken in connection with the terms of this will, and the course of decisions prior thereto, which were regarded as authority in Ohio; and they fall within the strictest rule for the admission of parol evidence.

III.

ON THE DEATH OF MARY JANE BARR, THE FARM IN QUESTION DESCENDED TO THE BROTHERS AND SISTERS OF WILLIAM BARR.

The only other questions in this case are those relating to the statute of descents of December 30th, 1815.

If the fee of the farm vested in Mary Jane Barr, what became of it upon her death?

Did it descend to the children of William Barr, Senior, or their legal representatives, or did it descend to the brothers and sisters of the testator, or their legal representatives? The question of the persons to whom property shall descend, is purely a question of statutory law in Ohio.

Drake *v.* Rogers, 13 Ohio St. R. 30.
Prim *v.* Cox, 16 Ohio, 32.
Curren *v.* Taylor, 19 Ohio, 39.

When Mary Jane Barr died, she left no lineal descendants, and no brothers and sisters, and William Barr, the testator, was dead. The case is the precise one provided for in the 4th sub-division of the 1st section of the statute of December 30th, 1815.

The statute provides that property of intestates shall descend: 1st. To the children of the intestate and their legal representatives. 2nd. If there be no children or

their representatives, then to the brothers and sisters of the intestate or their legal representatives. 3rd. If there be no brothers and sisters, then to the ancestor from whom the estate came; and 4th. If the ancestor from whom the estate came be dead, then to the brothers and sisters of the said ancestor, or their legal representatives.

If the estate vested in Mary Jane Barr, she was clearly the intestate, and William Barr, Senior, was the ancestor from whom the estate came. The idea thrown out in the brief written by Mr. Andrews, that William Barr, Senior, was the intestate under the statute, strikes me as somewhat metaphysical and refined, after so much has been written by counsel for plaintiffs, upon the true construction of his will, which disposes of *all* his property in clear and unmistakable terms.

The effort is made in this brief to bring into this explicit statute, other terms and provisions, by implication, from what is called the inherent equity of the statute, and the reason upon which it was founded. They undertake to provide for what may be a *casus omissus*, in this act, by a most forced construction of language, which is as explicit as could possibly be used; language so clear, that there is no room whatsoever for construction.

They say, that the legislature "upon an innate moral sense of right and justice," provided for the securing the property to the ancestor from whom it came, in the absence of lineal descendants, or brothers and sisters of the persons to whom he had given the property; and that the same reason and general equity would carry it to his own children, rather than to his brothers and sisters, if he were dead. This may be a *casus omissus*, though it may be said that the legislature may have considered, in such a case, that if the ancestor had given the estate away from his children, or a part of them, it was evidence that he

intended that they should not have it, and therefore had provided that it should go to his next blood relatives, his own brothers and sisters. Nor is it true, that the legislature of Ohio has adopted this innate sense of moral right and justice, as the Supreme Court has decided. *Curren* v. *Taylor*, 19 *Ohio*, 39; *Birney* v. *Wilson*, 11 *Ohio St. R.* 431. But suppose a *casus omissus*, what of it? Is this the first, and only case of the kind, and does this give the judge any authority to add any thing to statutory law, which the legislature has omitted?

It would seem idle to argue such a question, or to refer to authorities upon it. But in deference to the very great learning and ability of the counsel, I will say a few words. The authorities are in direct opposition to any such action of the courts.

Dwarris on Statutes, 707.
Notley *v.* Breck, 8 B. & C. 164.
Rex *v.* Barham, 8 B. & C. 104.
Jones *v.* Smart, 1 T. Rep. 52.

In the case of *Notley* v. *Breck*, Ch. J. TENDERDEN (speaking of the bankrupt law), says:

> "The intention certainly was to prevent voluntary preferences; the words may probably go beyond the intention, but if they do, it rests with the legislature to make the alteration. The duty of the court is only to construe and give effect to the provision."

In another case the same learned judge says:

> "Our decision may perhaps in this particular case, operate to defeat the object of 59 Geo. 3, but it is better to abide by this consequence, than to put upon it a construction not warranted by the words of the act, in order to give effect to what we may suppose

to have been the intention of the legislature." 8 *B. & C.* 104.

And in the case of *Jones* v. *Smart*, J. Buller, says:

"I am firmly persuaded, that had the same question been put to them, concerning doctors, they would have answered in the affirmative. Be that as it may, we are bound to take the act of parliament as they made it; a *casus omissus* can in no case be supplied by a court of law, for that would be to make laws. Nor can I conceive that it is our province to consider whether such a law that has been passed, is tyrannical or not."

In the same case, Mr. Justice Amherst said:

"It is safer to adopt what the legislature have actually said, than to suppose what they meant to say. Though by the statute of Jac. I, rank as well as property, gave a qualification, yet under this statute of Car. II, a man can only be qualified by means of property. But, said the legislature, the heir apparent, who is in the line of succession, shall likewise be qualified, from a supposition that the esquire was so already. According to which construction, I can not think that it was their intention purposely to exclude the father, but in fact they have done it."

Another learned author, says:

"Where the legislature have used words of plain and definite import, it would be dangerous to put upon them a construction which would amount to holding that they did not mean what they had expressed. * * * Neither are courts to presume the intention of the legislature, but they are to collect it from the words of the act." *Smith's Commentaries on Statutory Construction*, sec. 715.

Not only the words of the act forbid it, but the legislation of Ohio, upon this very subject, has forbidden any such attempt. *Curren* v. *Taylor*, 19 Ohio, 39.

The provisions of this law, were in force from 1814 to 1835. In 1835, an act was passed, which provided under this fourth division of Sec. I.

> "If the ancestor from whom the estate came, be deceased, the estate shall pass to the children of such ancestor, or their legal representatives; if there be no children of such ancestor or their legal representatives, the estate shall pass to the brothers and sisters of such ancestor, or their legal representatives."

This act is precisely what the plaintiffs claim the act of 1815, shall be made by construction—a wide bridge to be spanned by the court.

In 1853, the law was again changed, by giving the estate in the fourth case, to the husband and wife, relict of such intestate for life, then fifthly, to the children of the ancestor, and sixthly, to the brothers and sisters of the ancestors and their legal representatives.

In 1857, the legislature made another change, and in the *second* division above, provided that the estate should vest in the husband or wife, relict of the intestate for life; then *third*, to his brothers and sisters; *fourth*, to the ancestor; and *fifthly*, to his brothers and sisters; then *sixthly*, to his next of kin.

In this statute, the children of the ancestor from whom the estate came, are again entirely ignored as such, and come in, if at all, after his brothers and sisters, sixthly and lastly, under the next of kin. In this regard, the legislature have gone back to the law, as it was in 1835. And the very last legislature again amended the statute of descents. The first four divisions of Sec. I, are like those

of the act of 1857, but the *fifth* division is again changed, and the children of the ancestor take, and after the children, the husband, or wife, relicit of the ancestor, and then his brothers and sisters.

It, therefore, appears that the legislature have from time to time, had this very matter before them, and that they have not made any such provision as the learned counsel attempt to bring into our law, by construction; and thus, in the construction of this statute, as in the construction of the will, they call loudly for help from the court, as men in distress. The legislature have said, that there was no such "innate moral sense of right and justice" recognized as a part of the law of descents, in Ohio.

It would be very difficult, in the face of this legislation, upon the subject, to maintain that the passing of the property to the brothers and sisters of the ancestor, from whom the estate came, in case of his death, in preference to his own children, or their legal representatives, was even a *casus omissus*. The matter has been, from time to time, directly brought before the legislature, and acted upon in such way as seemed best to them, for reasons and motives that can not effect this case, and they have, at one time, given the property to children of the ancestor, before his brothers and sisters, and have again taken it from the children, and given it to the brothers and sisters. The canons of descent have not been uniform in Ohio, in this regard, and this legislation clearly shows that the reasons of the law put forth by the learned counsel, have not uniformly governed.

And it is settled in Ohio, by several decisions of the Supreme Court, that the statute of descents does not follow this "innate sense of moral right and justice," and that the statutes of descent may carry the estate from the blood of the ancestor, from whom it came; for, had Mary

Jane Barr had children, to whom this estate descended, she would have been the ancestor, instead of William Barr, who was the meritorious person as to this estate.

Curren *v.* Taylor, 19 Ohio, 38.
Preckett *v.* Parker, 3 Ohio St. R. 398.
Clever *v.* Sanders, 8 Ohio St. R. 503.

Still more, had this estate vested in the sons-in-law, as the plaintiffs claim it did, under the will, and had they then died without issue, the estate would then have passed to the brothers and sisters of the sons-in-law, not of the blood of William Barr, or of his family. And this, although John M. Barr and his sisters, the wives of these sons-in-law, and Mary Jane Barr, were all living. *Birney* v. *Wilson*, 11 *Ohio*, 432. And if the estate had come to them by deed of gift, it would in the case, suppose have passed to the brothers and sisters of these sons-in-law, even if William Barr had been living; for in no event could he be their ancestor.

Whatever the reasons for this legislation were, they are not directly before the court, and the court could not act upon them if they were. The law of descent is so explicit and clear in its provisions, that the court could not add to it, or change it, or add conditions, no matter how many or strong reasons there were for such course. The reasons are for the legislature, and until they act upon them, the court must carry out the provisions, as they find them expressed in the statute. It is very clear, that under the act of December 30th, 1815, the farm in question descended to the brothers and sisters of Wm. Barr, upon the death of Mary Jane Barr, and the same is now in these defendants, by purchase from them.

MR. EWING'S REPLY.

First.—I have just seen Mr. Ewing's additional brief or reply. I have anticipated the answer to most of it. He substantially abandons authorities, and the general principles of the books as to the vesting of estates, and stands upon the intent of the will, pure and simple. I knew, that the great mind of Mr. Ewing (to say nothing of his very distinguished associates), would come to this; for it is perfectly evident, that unless they can carry this case, in defiance of authority and principles heretofore generally recognized, they can not carry it all. Who ever denied, that the intention of the testator, *as expressed in this will*, was to govern? No one on our side of the case. But pray how do you ascertain this intention? When William Barr employed David Wade, an old common law lawyer, to write his will, and he wrote it, using terms and expressions having a well defined legal meaning, then generally recognized, and acted upon by the profession in drafting wills, and by the courts in expounding them, are we to construe this will, without any regard to these terms, as *then* understood? Could you in that way reach the intent of the testator? Are you not to use language as understood by the testator's legal adviser, who drew the will, and as was generally understood at that time? If you desired to get at the meaning of any disputed passage of scripture, would you throw aside the language in which it was written, and the meaning of terms and expressions as then understood by the writers, and those to whom it is addressed? A will of real estate is addressed to lawyers, who are to pass upon the titles, from time to time. If a commercial contract was made, and the terms and language of trade were used therein, would you not in construing it, take the meaning of these terms as understood in the trade? See

1 Duer on Ins. p. 180, sec. 32.
Att'y. Gen. v. Shore, 11 Sim. 621, 626, 632.
1 Greenlf. on Ev. sec. 278.

And so, where a will, fifty years old, is drawn by a lawyer, and in the creation of estates he uses language and terms of well defined and well known significance, must you not, to get at the intention of the testator, as expressed in the will, construe this language and those terms as understood at the time? For a strong case of this king, see *Attorney Gen.* v. *Shore*, 11 *Sim. R.* 626, 632.

There is no other possible way of reaching the intention of the testator. David Wade, in all that part of the will relating to this farm, has carefully used terms and expressions, precisely such as had previously been used, and which had received a construction of the courts, not disputed or doubted by any one at that time. The terms of this trust, are identical with those in several of the cases cited in this brief; and the words, "and upon the decease" of Maria Barr, had been passed upon, and were well understood to be expressive, not of a condition, but of the postponement of the enjoyment only, and not of the vesting of the estate. The idea, that we can cut loose from the common meaning of language, and the learning of the profession, or that the courts of Ohio, or any other courts, of one particle of sense, have ever, or will ever do so, or attempt to do so, is the most fallacious position that learned and able counsel were ever driven into, in a case of this character.

Mr. Ewing says, "it matters not what means other chancellors have resorted to, to find the intention of other testators who divised under other laws or conditions." But it does matter; for these general principles, and these determinations of the court, familiar to the profession, at the time this will was written, were taken into view, and

the terms and legal expressions were used in the sense in which these decisions and principles had fixed them; and you might as well undertake to throw away the language of the trade in a commercial contract, as not to regard these decisions.

Nor does this language of Mr. Ewing fairly represent the decisions to which he alludes. The wills referred to are not "made under other laws or conditions." Nor is it true that the courts of Ohio now or ever committed the egregious folly not to consult these decisions of England and of the other States upon questions of wills, to which the learned counsel alludes. What are these estates other than that which the unwritten law has made them? And how and by what terms are they created? They are fixed by this same unwritten law, and we have drifted down, or been brought down, to the present day, under them and in unison with them; and we could no more cut away from these decisions and general definitions which they have established, than we could at once do away with the use of language, which has come down to us through the learning and usages of they ears that have gone before us. Let any one undertake to do that, or to make any considerable change in the language in common use, and see what would be the effect upon the practical affairs of the world. It would overturn and unsettle everything and entail the grossest injustice upon innumerable parties. Fifty years ago, William Barr, desiring to convey this farm, by will, went to David Wade, a lawyer, learned in the common law, and got him to write this will. He wrote it, using terms and legal expressions, in a sense then understood in the courts, and among the profession. The source to which he, in common with courts of the day, looked, was the decisions in England, and of the States of this country. Ohio then had no decisions.

William Barr understood this will in this sense, and it is impossible to get at the meaning of the will without seeing how these terms and expressions were *then* used and understood.

The Court can not be placed in his position in any other way than to go back with David Wade to this same source, to these decisions and general definitions, which I have cited. These very defendants as they have purchased have consulted counsel; parties have purchased and sold this very property with direct reference to such intent, thus to to be ascertained. See quotation from Lord Brougham in *Phipps* v. *Ackers*, p. 84 of this brief.

The courts of Ohio continually consult and follow the decisions of England, and of the other States of this country upon questions relating to the intent of the testator, in wills that come before them. See,

Jeffers *v.* Lamps on 10 Ohio St. R.
Brewster *v.* Benedict, 14 Ohio.
Moore *v.* Beckwith, 14 Ohio, 137. 14 Ohio St. R
Pruden *v.* Pruden, 14 Ohio, 254. " "

Second.—Nor would it be wise, in another aspect of the subject, for our courts not to consult these decisions and principles, if they could do otherwise? People in Europe and in the other States, own real estate in Ohio; and our people own property in the other States. They are conveying their property by deed and will, and although no one would argue in favor of changing any settled policy of Ohio, upon any matter relating to titles, simply because it was different in England, yet it is a happy circumstance, where the general principles and definitions in reference to titles of real estate are like those in the other States of this country.

I have always thought that there was, at least, good sense in the following remarks, made in the Supreme

Court of Maine, in the case of *Thornton* v. *The U. S. Ins. Co.* 12 *Maine* 152:

> "It is desirable that the decisions in relation to the law of insurance and commercial law, generally, should be similar in all the courts of this country; and where we find a principle so well settled and in courts of so great respectability in the most commercial state, we feel no hesitation in adoptlng it."

This course has been followed by the Supreme Court of Ohio, in the case of *Perryn Adm.* v. *The Pro. Ins. Co.* 11 Ohio, 147, where they receded from their former decisions, in part, at least, that the law of Ohio might conform to the law, as declared by the Supreme Court of the United States, and the courts of the states. The direct question was presented, whether the court should recede from its previous decisions. Speaking of the law of insurance, as determined in other courts, they say:

> "Since it has been accepted in this form, in these courts, to whose decisions we look for evideuce of commercial law, and since we believe it has, in fact, become a well settled doctrine of law merchant, we feel it the duty to recede from the position heretofore taken in these adjudged cases.' 11 *Ohio*, 172.

And so they did recede from the position taken in two decided cases, that the law of Ohio might correspond with the law of the other states and of England.

Now, I do not ask the court to recede from any written or unwritten law of Ohio; for, I maintain that there is no difference between the law of Ohio and the law of England, and the other states, upon these questions now under discussion; but I say, that the general principles relating to the creation of estates in land, and the general definitions, are somewhat the same the world over; and it is not at

all unimportant that they shall be, at least, as between states situated as ours are, where land is owned, as it is, and assumes a somewhat commercial aspect, and that we should not be too hasty in making changes, or in presuming that these general definitions as to the vesting of estates, are not the law of Ohio; or to declare that wills written fifty years ago, under the inspiration of these general principles and decisions, shall not be construed with some reference to them.

Third. The great error of Mr. Ewing's reply, lies in this: he assumes that the will shows the intent of William Barr, Senior, to control the whole estate, until after John M. Barr died. This, I think, is mere assumption; for the remainder in fee is no more controlled in this case, than in any other, where a life estate is first given to father and mother, and after their deaths, the remainder to the children. He says: it is controlled through the trust to the sons-in-law. This is easily answered.

1st. The trust was only of the life estates, and did not touch the remainder,—does not purport to touch it.

2nd. It is plain, upon the very face of the will, that the trustees were not to control the estate, not even the life estates. It is admitted in the arguments of the plaintiff's counsel, that the trust was because of John M. Barr's intemperance, and not for any purpose of holding the remainder in abeyance, or bound by a condition or contingency.

The terms used in creating this trust, show that the trustees were not to control even the life estates, and the purpose of it is quite plain.

He designed that his son should have a life estate, and his children, the fee; but, if he died, leaving children and a widow, that out of the estate given the children, the

widow should have a life interest for her support. As John M. Barr was intemperate, he placed the life interest in the trustees, so that they might, if the protection of these parties required, ask the aid of a court of equity to protect them, because of his son's intemperance, and because the widow might again marry. The sons-in-law might, in this way, have a standing in court for this purpose. This was the whole object. It is evident from the terms in which it is expressed, and I believe the trust was valid *for that purpose*, and only that. The trustees were to permit the life tenants "to hold, use, occupy and possess," and "take and receive the rents." These terms show that they were not to control even the life estates. *See cases cited on page* 40, 41.

Nor could they prevent a sale of John M. Barr's equitable estate. 4 *Kent's Com.* 304. And it is clear enough, that they had no interest in, or any thing to do with, the remainder in fee, not conveyed to them.

Fourth.—Mr. Ewing also presses again, the idea that William Barr contemplated the innumerable contingencies, which might happen, and by possibility leave this estate to descend to his *own* brothers and sisters, whom he speaks of as "remote relatives;" and speaks at least three times of the improbability of this, arising from what he terms "ordinary human motives," "human purpose and human motive."—*See pages* 2, 3, 5 *and* 8.

Well, the court has got a good deal to do, if it is going into this; for "human motives" and human foresight and knowledge, are as various and varied as mankind; and the consequence, as is stated in *Moore* v. *Beckwith*, reported in the very last volume of the Ohio Reports, is, "that wills are as variant as the human countenance," *page* 136. The affections sometimes perform strange freaks, and testamentary dispositions are not framed in any given mould,

but partake of the peculiarities of men. And the court in this inquiry into "human motives," and applying them to a man who died fifty years ago, and of whom we can now know very little, will find upon the face of this very will, some trouble, in reaching the point desired by the learned counsel. How happens it in this will, that he has not left one cent to his daughters, but has given all his property, except this farm, to those who might, by will or deed, transfer it to those not of his blood, or through whom it might descend to such, and from whom he could in no event be the ancestor, under the statutes of descent then in force.

Curren *v.* Taylor, 19 Ohio, 38.
Prickell *v.* Parker, 3 Ohio St. R. 398.
Cliver *v.* Sanders, 8 Ohio St. R. 503.

Again.—From what ordinary human motive did he hold out a premium of one thousand dollars, to induce Maria Barr to marry again; for this is clearly the true construction of the will.

Was she pretty? Did she flatter him? Did some peculiar grace of movement or expression of countenance, the sparkle of the eye, or, perhaps, some attention in his feeble old age, or some happy turn of her mind, take his fancy? I will not follow this further, but when the court goes back fifty years, and puts itself in the place of William Barr, and commences the survey of human motives as effecting his testamentary disposition, I would suggest that they better first make a will, and give up all other things in this life; for there is no end to these motives or the contingencies that might be inquired after. Human motives may, no doubt, sometimes be appealed to, but not to build up a new will, as in this case, against the

clear intent of the testator, as ascertained by well known rules of construction.

But, as I have anticipated this in the former part of the brief, I shall leave it by suggesting that it might be doubted whether these provisions of the will were exactly in accordance with "ordinary human motives."

Fourth.—Mr. Ewing finds many difficulties in what he calls our construction of the will, but it is evident that they depend upon these "human motives," when taken in connection with his further idea, that William Barr hung up this remainder, upon a contingency, certainly, until John M. Barr should die.

> "He says that Mr. Stanbury contends that child or children in this devise, does not mean issue, that grand children can not take under it. This is contrary to the obvious meaning." p. 4.

How is it contrary to the obvious meaning? If this remainder vested in John Barr's children, *at the death of William Barr*, subject to open up and let in after born children, (as we maintain it did); and if there was no human probability from the respective ages of William Barr, (then an old man, and in feeble health,) and Mary Jane Barr (then but three months old) that John M. Barr could have grand children *at the death of William Barr;* how is it, upon this construction, that grand children of John M. Barr would not take? We do maintain that by the term children, in the granting clause, William Barr did not mean "isssue," in its broadest sense, as he used that term in the divesting clause; and yet I maintain that situated as the parties were, that this remainder would vest in any grand child John M. Barr might have; for, he could not have any in all human probability, in William Barr's life; and if John M. Barr's children should die

leaving children, the estate would vest in them by descent. "Children," is a word in common use, and has a well defined legal significance, the same as the common and ordinary meaning. It does not, in common parlance, or in law, include grand-children, or great grand-children, though in either case, it may be so construed, *where it was evidently so used.*

"Issue," is an ambiguous term, of broader signification than children, and including children, grand-children, and all lineal descendants; and yet it may be limited to children, where it was evidently so understood. But in the use of it in this case, it evidently was not so understood. This question has also been anticipated. *See p.* 79 *to* 81 *of this brief.*

Mr. Ewing imagines another difficulty in our way. He says:

> "Suppose this child," (referring to Mary Jane Barr,) "die before John M. Barr, leaving children, and John M. Barr had died leaving another child, that other child would have taken the whole estate, and the orphan children of the deceased child nothing. This was manifestly against the intent of the testator. But if children mean issue, the whole difficulty is obviated."

It is obviated without this. William Barr's age was such (being an old man in feeble health), and Mary Jane Barr's age was such, (being but three months old,) that in all human probability, none of John M. Barr's children could die leaving children before William Barr would die, and he could not have intended to provide against any such contingency.

But we are not bound to meet all the difficulties or contingencies, that might have been imagined, at the time

this will was written, or to find a construction that would meet them. Courts would have a hard time of it, if that was the law. I could suppose hundreds that would show, that William Barr did not consider anything in reference to the persons who might possibly have this property in the future, provided John M. Barr died leaving a child. For instance: suppose, upon the death of John M. Barr and Mary Jane Barr, the fee had passed to William Barr's sons-in-law, as it would upon plaintiffs' construction of the will, and they to die without any issue of the blood of William Barr, where would the estate then go to, even supposing John M. Barr, the daughters of William Barr, and Mary Jane Barr, all to be living? It would clearly pass to the children of the sons-in-law of another marriage, if they had any; if not, to the brothers and sisters of these sons-in-law. It would not pass to the children of William Barr, nor to his own brothers and sisters, but to the brothers and sisters of these sons-in-law, who had no drop of his blood. *Prickett* v. *Parker*, 3 *Ohio St. R.* 398. *Birney* v. *Wilson*, 11 *Ohio St. Rep.* 432.

But, it is idle to conjure up trouble that never entered Wm. Barr's mind, sleeping or waking, so far as we know. His will shows that he was then not only old, but feeble. It begins:

> "In the name of God! Amen! I, Wm. Barr, Senior, of the town of Cincinnati, in the state of Ohio, *being old and of feeble body.*"

At the time he wrote this, John M. Barr's only child, Mary Jane Barr, was but three months old. He evidently did not expect to live long, and did die in less than three months. The remotest of all probabilities, was that of the children of John M. Barr dying, leaving issue, before Wm. Barr died,

and, therefore, we can not suppose that any such idea ever entered his head. All these difficulties result from the construction of the will, that leaves the remainder hung up, upon a contingency, until the death of John M. Barr.

Take the family as it stood, the property as it stood, and as Wm. Barr had dealt with it, and let the remainder vest according to ordinary rules, and as the will shows that it was intended to vest, at Wm. Barr's death, and all these troubles vanish. Let the will be as it was written, and as it stands recorded, and as it has been regarded by those purchasing the property, and there are no difficulties. Human language and legal terms may be understood, and we have a known standard to go by. But "human motives" are so varied, that if this will is now to be constructed out of *them*, I fear that the court will find that the will itself, has vanished into—fog. The *intent* of Wm. Barr, *as expressed in this will*, is to govern. No one on our side ever thought or intimated otherwise. We say that it shall be ascertained by the language used, and that the meaning of the terms shall be taken as *then* understood.

On page 6 of this reply, M. Ewing refers to *King* v. *Beck*, 15 Ohio, 564; *Collier* v. *Collier*, 3 Ohio St. R. 371; and to *Parish* v. *Ferris*, 6 Ohio St. R. 579, as fixing the meaning of the word children, in this will, to be synonymous with "issue," and "issue," as synonymous with "heirs." These cases were decided many years subsequent to the writing of this will, and could not have effected it, and I think nothing can be found in them to sustain this position, or to shake the rules and authorities referred to in this brief.

It is all summed up in a few words, which I take from the syllabus of one of these cases. *King* v. *Beck*, 15 Ohio, 559:

> "The words, heir or heirs, in a will, *if such was the clear intent of the testator*, may be construed child or children, and they will take as purchasers."

No doubt they may, *in such a case*, but this clearly is not that case.

Every word of this will, and every provision thereof, *as we construe it*, stands consistently together, giving the words, "child or children of John M. Barr and their heirs," in the vesting clause, the ordinary and legal signification; and the words, "should John M. Barr die without issue of his body," in the divesting clause, that broader signification, which is commonly attached to them in law. And the language of Judge Cowen, in the case of *Cutler* v. *Dougherty*, 23 Wend. 522, cited on pages 80, 81, of this brief, is in point. Among other thing there quoted, he says:

> "But there is no case which warrants us in taking up such a meaning, where the primary sense may be literally satisfied, and there is nothing in the will to raise anything more than a doubt." *Page* 522.

The terms of this will, which vest the fee in the children of John M. Barr and their heirs, are perfectly consistent with those which divest it, if John M. Barr die without leaving issue. There is nothing to raise the doubt, even. As the law, for great and beneficent reasons, consistent with all the principles relating to wills (and as more consistent with the probable intent of the testator), favors the earliest vesting of estates, and for the same reasons, does not favor the divesting thereof upon contingencies, the language used by David Wade in connection with the divesting clause, is different. Mary Jane Barr might die before her father, leaving children. In the divesting clause, Mr. Wade therefore uses other and broader terms, "issue,"

which would include Mary Jane Barr's children, and keep the estate in them.

These rules are not "artificial," much less "merely" so; nor are they technical. On the contrary, they grow out of the very nature of estates created by will, and are the necessity of having known, permanent and fixed titles, for any successful or energetic business or use of property. They are not local, depending upon special customs or reasons. They lie deeply imbedded in the whole system of the law of real estate in this country, and flow directly from a most beneficial and enlarged public policy. They have come down for more than a hundred years, as a part of the system of real estate, which binds mankind to the soil, and links one generation with another. To break loose from them, or endeavor to administer the law, without regard to them, would shake society to the very foundations; and our courts are not guilty of the supreme folly of endeavoring to do it. The case of *Moore* v. *Beckwith*, to be found in the last volume of the Ohio Reports, is a marked instance of the respect paid by our courts, to the decisions of England, and the other States of the country, upon this question of the intention of the testator, in a particular will.

I would not misrepresent Mr. Ewing, for I have ever looked up to him with much deference and regard; but it seems to me that there is an attempt in his briefs, (not expressed in so many words), to create the impression, that these rules and authorities are out of place in Ohio, or at least of little importance. No greater mistake was ever made by so great a man, and so great a lawyer.

I have considered them important in the case, and have therefore presented them somewhat at large, not because there was any such doubt as to make it necessary, in my opinion, but for the convenience of the court, *and because of the peculiar interests which we here defend.* I confess

that I have felt unusually interested in this case. My associates had so fully presented the will, that there was not much else left me, but to present these universally recognized principles and authorities.

The property in question is in the immediate vicinity of Cincinnati, which lies directly beneath it. The beautiful valleys of Millcreek, of the Licking and Ohio rivers, are in view in front of it. It has, in the progress of events, since the will in question was written, become of very great value, owing to circumstances with which the plaintiffs have had no connection whatsoever, through the improvements and embellishments of these defendants. There are now upon it some dozen beautiful suburban residences,—the HOMES of our clients. Here they have had their joys and their sorrows; here they have been married, and their children have been born; and from here, some of them, indeed most of them, have followed to the grave, those near and dear to them. Every foot of it, every flower and tree has received their care, and rich memories cluster around it, like vines hanging from the trees. And more; one of the defendants, whom I specially represent, the venerable Archbishop of Cincinnati, has, with Christian patience, and Apostolic faith, here reared a beautiful Chapel, and a College, dedicated to the instruction of young men, for the sacred office of the ministry. THESE *are the things that have given real value* to this primitive farm of William Barr.

As the plaintiffs had neither any sagacity in foreseeing nor merit in producing them, *neither have they*, in my opinion, *any law or justice in their claim.*

All of which is respectfully submitted.

T. D. LINCOLN,
Of Counsel for the defts.

APPENDIX.

"A."

THE WILL OF WILLIAM BARR.

In the name of God, Amen! I, William Barr, senior, of the town of Cincinnati, in the State of Ohio, being old and feeble of body, but of sound and disposing mind, memory and judgment, praised be God for the same, do make and declare this my last will and testament, in manner and form following, that is to say:

I give and devise to my sons-in-law, William Barr, James Keys, and John B. Enness, of Cincinnati aforesaid, and to their heirs, all and singular that certain farm, tract or parcel of land, situate, lying, and being in the county of Hamilton, and State of Ohio, which I purchased of John Cross, containing one hundred and sixty acres, to hold the same premises to them and their heirs in trust (first) for the use of my son, John M. Barr, during his natural life; but nevertheless, to permit and suffer my son, John M. Barr, to hold, use, occupy, possess, and enjoy the said farm, and to receive and take the rents and profits thereof, during his natural life. And in case my said son, John M. Barr, should die leaving a legitimate child, or children, then, also, in trust for Maria Barr, wife of the said John M. Barr, in case she survive him, during her natural life, for the purpose of maintaining herself and the said child, or children, and educating the said children; but, nevertheless, to permit and suffer the said Maria Barr, wife of the said John M. Barr, to hold, use, occupy, possess, and enjoy the said farm, and to receive and take the rents and profits thereof, during her natural life. And upon the decease of the said Maria Barr, wife of the said John M. Barr, I do further give and devise the remainder of my estate in said farm unto the legitimate child, or children, of the said John M. Barr, and their heirs forever. If my said son leave but one child, as aforesaid, then I give and devise the said farm to him or her, or his or her heirs forever. But, if he leave two or more children, then I give and devise the said farm unto such chil-

The Trust

The Vesting Clause

dren, and their heirs, to be equally divided between them. But should my said son, John M. Barr, die without leaving any issue of his body, then, and in that case, I do give and devise the remainder of my estate in the said farm unto my said sons-in-law, William Barr, James Keys, and John B. Enness, and their heirs forever.

The above two clauses

And if the present wife of my son, John M. Barr, should survive him, he, the said John M. Barr, dying without leaving any legitimate issue, then I direct my said sons-in-law, their executors and administrators, to pay or cause to be paid unto her yearly, and every year, during her widowhood, the sum of two hundred dollars. And if during her widowhood, she should again be lawfully married, then I further direct my said sons-in-law, their heirs, executors, or administrators, to pay or cause to be paid unto her the sum of one thousand dollars, unless the personal estate of my said son, John M. Barr, at his death, should exceed the sum of four hundred dollars; then, whatever the personal estate shall exceed the last mentioned sum shall be taken and deducted from the said sum of one thousand dollars; the said annuity and gift at marriage, or either, to be paid out of my personal estate. And I do hereby further direct my executors, hereinafter named, to finish or cause to be finished, in a plain manner, the house and kitchen at present erected on the farm aforesaid, for the use and occupation of the said John M. Barr, as soon after my decease as is practicable; the said expense to be defrayed out of such parts of my personal estate as are not especially bequeathed. Also, I do heroby empower and direct my executors, hereinafter named, to apply the proceeds of a debt due to me, when collected, by one Joseph McKinny, of the State of Pennsylvania, of two thousand fifty-one dollars and fifty-five cents, and the interest due or to grow due thereon, as, also, the proceeds of a debt due to me, when collected, by one Frederick Boas, of the State of Pennsylvania, of nine thousand five hundred and thirty-seven dollars fifty-two cents, and the interest due or to grow due thereon, together with proceeds of the sale of my house and lot in the town of Shippensburgh, in the State of Pennsylvania, amounting to the sum of five hundred dollars, or so much thereof as may be necessary, towards the payment in full of the one hundred shares which I have purchased in the Miami Exporting Company Bank of Cincinnati, Ohio. Also, I give and bequeath unto my beloved wife, Mary Barr, the entire income or dividend on the said one hundred shares in the Miami

2051.55
9537.52
500.00
12089.07

Exporting Company, as well after as before the payments thereon are completed, subject nevertheless and charged with an annuity to our beloved son, John M. Barr, of the sum of fifty dollars yearly, during his natural life; the first sum of fifty dollars to be paid in advance, within three months after my death, and thenceforward, at the expiration of each year from the date of such payment, until his decease. After the decease of my beloved wife, I will and bequeath the dividends of the said one hundred shares to be equally divided between my said sons-in-law, their heirs, executors, and administrators; subject nevertheless to the annuity aforesaid to my son, John M. Barr, in case he survived my said wife. Also, I do further give and bequeath to my beloved wife, Mary Barr, all my household furniture, to be held absolutely as her property. Also, I give and beaueath unto my grandson, William Barr Keys, my gold watch. Also, I do further give, devise, and bequeath the remainder of my estate, both real and personal, to my sons-in-law, William Barr, James Keys, and John B. Enness. Also, I direct my executors to pay my just debts, and all testamentary and other incidental expenses. Also, I will and appoint the said William Barr, James Keys, and John B. Enness, and the survivor or survivors of them, executors of this, my last will and testament; hereby revoking and making void all and every other will or wills at any time heretofore made, and I do declare this to be my last will and testament.

In witness whereof, I, the said William Barr, Senior, have hereunto set my hand and seal, this twenty-fourth day of February, in the year of our Lord Eighteen hundred and sixteen.

WILLIAM BARR. [L. S.

The attesting witnesses were David Wade, Francis Carr, and David McKnight.

"B."

THE FIRST SIX SECTIONS OF THE STATUTE OF DESCENTS OF DEC. 30, 1815.

An act regulating the course of descents and distribution of personal estate.

§ 1. *Be it enacted, etc.* That when any person shall die intestate having title to any real estate of inheritance lying and being in this State, which title shall have come to such intestate by descent, devise, or deed of gift from an ancestor, such estate shall descend and pass in parcenary to his or her kindred, in the following course: First—to the children of such intestate or their legal representatives: Second—if there be no children, or their legal representatives, the estate shall pass to the brothers and sistors of the intestate, who may be of the blood of the ancestor from whom the estate came, or their legal representatives, hhether such brothers and sisters be of the whole or of the half blood of the intestate: Third—if there be no brothers and sisters of the intestate of the blood of the ancestor from whom the estate came, or their legal representatives, and if the esiate came by deed of gift from an ancestor who may be living, the estate shall *ascend* to such ancestor: Fourth—if there be neither brother nor sister of the intestate of the blood of the ancestor from whom the estate came, or their legal representatives, and if the ancestor from whom the estate came be deceased, the essate shall pass to the *brothers and sisters* of the ancestor from whom the estate came, or their legal representatives; and for want of such brothers or sisters or their legal representatives to the brothers and sisters of the intestate of the half blood, or their legal representatives, though such brothers and sisters be not of the blood of the ancestor from whom the estate came: Fifth—if there be no brothers or sisters of the intestate, or their legal representatives, the estate shall pass to the next of kin to the intestate of the blood of the ancestor from whom the estate came.

§ 2. That if the estate come not by descent, devise, or deed of gift, but was acquired by purchase by the intestate, it shall descend to the children of the intestate and their legal representatives.

§ 3. That if there be no children or their legal representatives, the estate shall pass to the brothers and sisters of the intestate of the whole bload and their legal representatives.

§ 4. That if there be no brothers or sisters of the intestate of the whole blood or their legal representatives, tho estate shall pass to the brothers and sisters of the half blood and their legal representatives.

§ 5. That if there be no brothers and sisters of the intestate of the half blood or their legal representatives, the estate shall ascend to the father, if the father be dead, then to the mother.

§ 6. That if the father and mother be dead, the estate shall pass to the next of kin to and of the blood of the intestate.

"C."

AGREED STATEMENT OF FACTS.

DOE EX DEM. JOHN A. POOR AND WIFE, vs. PATRICK CONSIDINE AND OTHERS. } *In ejectment in U. S. Circ't Court, Southern Dis. of Ohio.*

The facts in said case are as follows:

1. The land in controversy was conveyed by John Cross and wife, September 6th, A. D. 1814, to William Barr, Senior, of Cincinnati, being 161 14-100 acres, lying in the county of Hamilton, and State of Ohio, and being a part of section 36, in township 4, range 1, of the Miami purchase, so called, being the premises described by metes and bounds in the declaration; said deed of John Cross and wife, to said William Barr, Senior, being duly recorded in the book of records of said Hamilton county.

2. Both the lessors of the plaintiff and the defendants claim title under said William Barr, deceased. Said William Barr, Senior, on the 24th day of February, A. D. 1816, being seized in fee simple of said premises, executed his last will and testament, and died seized of said premises on the 15th day of May, A. D. 1816, and the said last will and testament of the said William Barr, Senior, was duly admitted to probate in the Court of Common Pleas of the said Hamilton county, at the July term thereof, A. D. 1816, a duly certified copy of which said will is herewith filed, marked (A.)

3. John M. Barr, the son of William Barr, Senior, referred to in said will, was married to Maria McCune, July 22d, A. D. 1811, and a daughter was born to them named Mary Jane Barr, December 27th, A. D. 1815, at Cincinnati, where they resided during their married life. The said John M. Barr died August 10th, A. D. 1820, and his said child, Mary Jane Barr, died November 27th, A. D. 1821.

4. The widow of said John M. Barr (Maria Barr) was again married to John Bigelow, October 19th, A. D. 1824; she had, as was decided by the Supreme Court of the State of Ohio, in the case of *John Bigelow and Maria, his wife* vs. *William Barr and others*, 4 Ohio Reports, 358, a life estate, in said premises, under the will of said William Barr, Senior.

5. On the 26th of July, A. D. 1838, the said Mrs. Maria Bigelow conveyed said premises, by deed purporting to be a conveyance in fee to Ephraim Morgan and Lot Pugh, for the consideration of $2,000, and they afterwards went into possession of said premises. Mrs. Maria Bigelow died August 3d, A. D. 1860, her said husband, John Bigelow, having died before that date.

6. On the 13th day of September, A. D. 1839, said Lot Pugh released his interest in said premises to said Ephraim Morgan, and defendants are purchasers by deed in fee simple, under said Morgan.

7. On the 20th day of April, A. D. 1847, a bill in chancery was filed in the Superior Court of Cincinnati, by Ephraim Morgan, against John B. Enness and others to quiet his alleged title to said premises, a duly certified copy of the proceedings and decree in said case being herewith filed, marked (B,) and also, at the same time and in the same Court, another bill in chancery was filed by one Adam Moore against the same defendants, and for the same purpose, a duly certified copy of the proceedings and decree in which case last mentioned is herewith filed, marked (C.)

8. On the 29th day of June, A. D. 1858, a petition to perpetuate testimony in reference to said premises, was filed in the Court of Common Pleas of said Hamilton county, by said *Ephraim Morgan and others* vs. *John B. Enness and others*, a duly certified copy of the proceedings and order in which case last mentioned is herewith filed, marked (D.)

9. William Barr, Senior, left at his death four children, to-wit: Mary Barr, who was then the wife of William Barr; Susan Enness, who was then the wife of John B. Enness, and Mary B. Keys, who was then the wife of James Keys, the said William Barr, John B. Enness and James Keys being the three sons-in-law mentioned in the said will of William Barr, Senior, and named as devisees in remainder, and as residuary devisees and executors therein; the fourth child being the said John M. Barr; the said devisees, Barr, Keys and Enness having died after the death of Mary Jane Barr, the said child of John M. Barr.

10. Said daughters and sons-in-law of said William Barr, Senior, are all dead, and were all dead before the commencement of this suit.

The heirs of said daughter, Mary Barr, and of her said husband, William Barr, and of each of them, are as follows, to-wit: their children—Mary Barr; Margaret R. Poor, wife of John A.

Poor; Susan Spencer; Ellen Finley, wife of Alexander Finley; David M. Barr, and also the three children of their deceased son, William V. Barr, to-wit: Ellen P. Barr, James B. Barr and Alexander F. Barr, the three last named being minors, under the age of majority.

The heirs of said Susan Enness and of the said husband, John B. Enness, and of each of them, are Rachel Ellison, wife of A. B. Ellison, and Ellen Shiras.

The heirs of said Mary B. Keys, and of her said husband, James Keys, and of each of them, are as follows, to-wit: the children and heirs of their daughter, Mary B. Keys, and of her husband, ———— Keys, both deceased before the commencement of this suit, as follows, to-wit: James Keys Wilson, William B. Wilson, Joseph H. Wilson and Mary F. Wilson, who are adults, and Richard A. Wilson and Ella T. Wilson, the two last named being minors, under the age of majority, respectively.

11. The said heirs of Susan Enness and John B. Enness have conveyed all their interest in said premises to the said Margaret R. Poor in fee simple, and the said heirs of said Mary B. Keys and her husband, James Keys, have in like manner conveyed all their interest in said premises to the said Margaret R. Poor, in fee simple, and the said heirs of Mary Barr and her husband, William Barr, have in like manner conveyed all their interest in said premises to the said Margaret R. Poor, in fee simple, excepting only the interests of the said Mary Barr (children of William and Mary Barr) and of the said Ellen P. Barr, James B. Barr and Alexander F. Barr, minor children of said William V. Barr, deceased, which still remain in them respectively, not having been conveyed to said Margaret R. Poor.

12. William Barr, Senior, had brothers and sisters, as follows, at the time of his death: Samuel Barr, John Barr, Robert Barr, Andrew Barr, Jane, married to W. McWharter, and Sarah, married to W. Grafter; of these two died, leaving no issue surviving them. The other four left descendants, who are their heirs.

Of these Samuel Barr had and left at his death five children as his heirs, of whom William Barr, the husband of Mary Barr, the daughter of William Barr, Senior, was one, entitled to one-fifth of his real estate.

13. Lessors of plaintiff are citizens of and residents in the State of Maine.

14. Soon after the date of the deed from said Maria Bigelow to

Ephraim Morgan, purporting to convey the fee simple, said Morgan acquired the title and interest of sundry parties, who were the descendants and heirs at law of the brothers and sisters of William Barr, Senior, the testator aforesaid, which brothers and sisters had previously died intestate.

15. That John M. Barr, at the date of the testator's will, was a man of intemperate habits.

16. It is understood that nothing herein contained shall limit the construction and legal effect of any deed of conveyance, but the same shall be determined by the Court.

17. The plaintiffs have exhibited to the defendants' counsel certain deeds of conveyance, under which the plaintiffs claim to derive title, also certain transcripts of records, which it is agreed be used for all purposes, so far as competent evidence without proof of execution and without objection, for want of government stamps, if such were required.

The defendants have exhibited to the plaintiffs' counsel sundry leases, deeds, mortgages and transcripts, which it is agreed are to be admitted in evidence without proof of execution, leaving open all questions as to the competency thereof as evidence.

18. The parties respectively shall be permitted to give additional evidence.

HENRY STANBERY,
GEO. E. PUGH,
T. D. LINCOLN,
Counsel for Defendants.
H. H. HUNTER,
T. EWING,
J. W. ANDREWS,
Counsel for Plaintiffs.

"D."

JOHN B. ENNESS TO DAVID SANDIDGE. DEED OF TRUST.

Whereas, I, John B. Enness, of the town of Cincinnati, Hamilton county, and State of Ohio, received from the late William Barr, Senior, of the town of Shippensberg, Cumberland county, and State of Pennsylvania, *at different times after my marriage with his daughter, Susan, cash and property to the amount of nine thousand dollars, as her proportion or interest in his estate,* which property

has been chiefly made use of in improving property in the town of Cincinnati, by said John B. Enness, and which has been given up to pay his debts; therefore, being anxious to secure to my said wife, Susan, the said sum of nine thousand dollars, this indenture, made this twelfth day of June, in the year of Lord one thousand eight hundred and twenty-two, between me, the aforesaid John B. Enness, of the one part, and David Sandidge, of the other part, *Witnesseth*, that the said John B. Enness, for and in consideration of the further sum of five dollars, lawful money of the United States, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, conveyed and confirmed, and by these presents doth grant, bargain, convey and confirm unto the said David Sandidge and his heirs forever, *all that certain piece or parcel of land situate, lying and being in Cumberland county, in the town or adjoining the town of Shippensburg, in said county of Cumberland, and State of Pennsylvania, it being a tract of land devised to William Barr, James Keys and John B. Enness, by the late William Barr, Senior, deceased*, containing one hundred and sixty acres, more or less, of which I, the said John B. Enness, am possessed of one equal undivided one third part of said tract of land. The said tract of land adjoins the road leading from Shippensburg to Baltimore, and adjoining the turnpike road leading to the city of Philadelphia; and all the estate, right, title, interest, claim and demand of the said John B. Enness, of, in and to the premises hereby bargained and sold, and every part or parcel thereof, together with all and singular the rights, members, privileges and appurtenances to the same belonging, or in any wise appertaining; to have and to hold the premises aforesaid hereby granted, bargained and sold, or meant and intended so to be, with all the appurtenances, to the only proper use and benefit and behoof of Susan Enness, wife of said John B. Enness, and her heirs forever. And the said John B. Enness, for himself, his heirs, executors and administrators, doth covenant, grant, and agree to and with the said David Sandridge, that he is the true and lawful owner of the premises hereby granted, and that he hath good right, full power and lawful authority, to sell and convey the same in manner and form aforesaid; and further, he, the said J. B. Enness, his heirs, executors and administrators, will warrant and forever defend the aforesaid premises, with all their appurtenanees, and every part and parcel thereof, unto the said David Sandidge and his heirs, against all persons claiming or to claim by from, or under him, them or any of them, or by, from

or under any other person or persons whomsoever. In witness whereof, the said John B. Eaness has hereunto set his hand and seal the day and year within written.

JOHN B. ENNESS. [Seal.]

Witnesses present:
JOHN MAHARD,
JOHN MAHARD,
JAMES GLENN.

Then follows acknowledgment, certificates, etc.

"E."

LEASE OF JOHN BIGELOW AND MARIA BIGELOW TO WILLIAM S. FISHER.

This agreement, made this 27th day of July, 1826, between John Bigelow and his wife, Maria, of one part, and William S. Fisher, of the other part, showeth that the said Bigelow and wife hath this day leased to the said Fisher the farm on which the said Fisher now lives for the term of one year, commencing on the first day of April last, for the sum of *one hundred and seventy dollars, fifty of which to be paid in repairs on said place, conformable to an agreement made between said Fisher and William Barr*, and the balance of one hundred and twenty dollars the said Fisher to pay to said Bigelow, one half on the first of October next, and the balance on the first of April, 1827. It is also agreed that the said Fisher may put down in a fall crop the large orchard west of the house, and the large field north of the house; the orchard to be seeded with clover. The said Fisher, at the expiration of the time above mentioned, is to deliver up the said farm to the said Bigelow and wife, or their order, all in good order, as the case will admit of. In witness whereof. the parties have hereunto set their hands and seals the day and date above written.

J. BIGELOW. [Seal.]
M. BIGELOW. [Seal.]
WM. S. FISHER. [Seal.]

Witness:
CHARLES S. RHOADS.

I hereby assign the occupancy of within or above lease from this

date to the first day of April next to John Salyer and Aaron G. Peterson, for value received, March 6th, 1827.

WM. S. FISHER.

LEASE OF WILLIAM BARR TO WILLIAM S. FISHER.

Article of agreement made this 19th day of Nov., 1824, between William Barr, of the city of Cincinnati, and State of Ohio, and William S. Fisher, of the same State, *Witnesseth:* William Barr rents to said William S. Fisher the farm on which Abijah Madox now lives, and adjoining lands of William Terry on the west and ——— Dickinson on the east, for the term of one year from the first of April next, or if possession can be had on the first of March next, then the term to be one year from the first of March next. For the occupation of said farm, Wm. S. Fisher binds himself and his heirs to pay Wm. Barr or his heirs two hundred dollars, in payments, as follows, viz: seventy-five dollars in six months from the first day of March or April next, at whichever of these times possession may be given; the other fifty dollars to be expended on the farm, at such time within the year as may be deemed most for the benefit of said farm, by the before-named Wm. Barr. The taxes are also to be paid by Wm. S. Fisher. He is to farm the place in a good and farmerlike manner; to cut no wood for firewood except fallen or decayed timber or the tops of such trees as may be found necessary to make rails for repairing fences. The grass seed sown is to be paid for by Wm. Barr, and Fisher is to have the privilege of leaving on the place fifteen acres of wheat when he leaves it, which wheat he is also to have the privilege of thrashing on said place. Witness our hands and seals the date before written.

WM. S. FISHER. [Seal.]
WM. BARR. [Seal.]

Witness present:
JOHN S. ROBINSON.

CINCINNATI, Aug., 1826.

The term of the before written lease having expired on the 1st day of March last, Wm. Barr rents Wm. S. Fisher the same farm for the term of one year from 1st day of March last, and on the same terms as last year, only with the alteration, viz: the rent for the present year *to be one hundred and twenty dollars per year in cash*, and *fifty dollars* in such repairs as Wm. Barr may direct on said farm deducting.

LEASE OF JOHN BIGELOW AND MARIA BIGELOW TO WM. S. FISHER.

This agreement, made this 8th day of March, 1827, between John Bigelow and his wife, Maria, of the one part, and John Salyer and Aaron G. Peterson, of the other part, showeth: that the said Bigelow and wife hath this day leased to the said Salyer and Peterson the farm lately occupied by Wm. S. Fisher, and on which the said Salyer now lives, for the ensuing year, viz: from the date hereof, the first of March, 1828. for the *sum of one hundred and eighty dollars*, one half to be paid in the month of September next, and the other half to be paid on the first of March, 1828. The said Sayler and Peterson are to be careful to keep the house, barn and farm in good repair, and not to cut any timber except for the use of the farm; any clearing of the land, making new fences or removing old, and all repairs of importance, as also the quantity of ground which they may seed down in fall or winter grain, will depend on future agreement, and at the expiration of the time aforesaid, the said Sayler and Peterson are to deliver up the said farm to the said Bigelow and wife, or to their order, in as good repair as the nature of the case will admit of. In witness whereof, the parties herewith have set their hands and seals the day and date above written.

J. Bigelow. [Seal.]
M. Bigelow. [Seal.]
his
John ✕ Salyer. [Seal.]
mark.
Aaron G. Peterson. [Seal.]

I hereby bind myself as security for the performance of the above lease, so far as respects the said Salyer and Peterson.

[Seal.]

TRANSCRIPT FROM THE PROBATE COURT.

The last will and testament of *Wtlliam Barr*, dec'd, was presented and same proven by David Wade, Francis Carr and David McKnight, who were sworn, being subscribing witnesses, will allowed, and Court direct letters testamentary, etc.. to issue. Executors, Wm. Barr, James Keys and John B. Enness, sworn.

No: 87.

Supreme Court of the United States

December Term, 1867.

JOHN A. POOR and others, Appellants

vs.

P. CONSIDINE and others. Appellees.

On Appeal from

~~IN~~ THE CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF OHIO.

ARGUMENT FOR DEFENDANTS, appellees.

By HENRY STANBERY.

Barnes & Jackson, 4 Pet. 1

CIRCUIT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO.

POOR, ET AL.
v.
CONSIDINE, ET AL. } *Ejectment.*

BRIEF FOR DEFENDANTS.

The land in controversy belonged to William Barr, of Cincinnati, who made his will, February 24, 1816, and died on the 15th May following.

He first devises this land to his three sons-in-law and their heirs, *in trust.*

1. For the use of the testator's son, John M. Barr, during his life, and to allow the son to possess the farm and take the rents and profits during his life.

2. If his son *should die leaving a legitimate child or children*, then in trust for Maria Barr, wife of the son, if she should survive him, during her life, for the purpose of maintaining herself and said child, or children, and educating the children, but to permit Maria to possess the farm, and take the rents, etc., for her life.

On the decease of Maria, if she survive, or, if not, on the death of John M. Barr, he gives the remainder of his

estate in said farm to the legitimate child or children of said John M. and their heirs forever.

If his son leave but one child, as aforesaid, he gives the farm to him or her, or his or her heirs forever. If he leave two or more children, he gives it to them and their heirs equally to be divided.

But if his son should die without leaving any issue of his body, then the remainder of his estate in said farm he devises to his three sons-in-law, William Barr, etc., and their heirs forever.

The testator next provides that "if the present wife of my son, John M., should survive him, he dying without leaving legitimate issue, she is to receive an annuity during her widowhood of $200, and if again married she is to receive $1,000, unless the personal estate of his son should exceed $400; but any excess is to be deducted from the $1,000."

John M. Barr had a legitimate child, a daughter, by his wife, Maria, living at the date of the will, and at the death of the testator. John M. Barr survived the testator, and died in the possession of the farm, August 10, 1820. His daughter survived him, and died Nov. 27, 1821, aged five years and eleven months. His wife, Maria, also survived both her husband and the daughter. She was again married to one Bigelow, and died in the year 1860.

The main question in the case is, whether any estate vested in the daughter of John M. Barr; and if so, what was the character of the estate?

The plaintiffs claim that the devise to the legitimate children of John M. Barr could not vest except on the contingency that such child should survive both parents—the father and the mother. The defendants claim that the devise vested in the child at the death of the testator, and if not then, that it vested upon the death of the father.

Inasmuch as equitable estates are subject, in respects to devises and descents, to the same rules which govern legal estates, I do not consider it a matter of consequence to inquire as to the legal estate in this farm, but as the opposite counsel consider it a matter of much consequence, it is proper to give it attention.

They claim that *a legal estate in fee* passed to the trustees, and continued in them during the life of John M. Barr, and during the life of his wife—each of them holding only *an equitable use* during their respective lives. They claim further, that, during the life of the father—and after his death, during the life of the mother, no *fee* vested in the issue of the marriage.

It is further argued that if *the fee* continued in the trustees till the death of the wife, the remainder to the issue, which was *a fee* also, could not vest till that time for the reason "that two distinct fees in the same tenements, can not, under any circumstances, be made to co-exist."

I really can not see that this question about the fee carries us forward a single step in the argument.

If the testator intended to vest a remainder in the issue at the death of his son, *that* intent would not be defeated by vesting a *fee* in the trustees to continue beyond the period when the remainder would vest; and, certainly, an equitable remainder is not inconsistent with an outstanding fee in trustees. But, say they, the remainder given by this will is a remainder *in fee* and, therefore, it can never vest until the *fee* given to the trustees ceases, and as *the fee* given to them must continue until both the parents die, *the fee* given to the child can not vest until both parents are dead. Now, let us put it the contrary way. If the remainder given to the child did vest on the death of the father, then, being an estate *in fee*, it put an end to *the fee* first given to the trustees. So that, at last, we are

here arguing in a circle, and we get no nearer the question as to the time when this estate in remainder was to vest. The idea suggested on the other side, that our construction would defeat the life estate of the widow, by putting an end to the fee in the trustees, has no foundation, for her life estate is just as secure with the fee vested in the child, as with the fee vested in the trustees. So, too, the estate of the child is just as secure with the fee vested in the child as with the fee vested in the trustees.

But, for the sake of legal accuracy, let us stop to inquire about this legal estate in the three trustees, the vesting and continuance of which, it is said, was an "obvious purpose and intent of the testator," "and a conservative power which the testator did not lose sight of for a moment." Pray what objects were to be gained; what purposes were to be protected by the continuance of the fee in the trustees, after John M. died? What had these trustees to do? Simply nothing, except for the benefit of the *cestuis que use*. There were certain things to be done about the improvement of the farm, not by *the trustees* but by *the executors*.

I need only refer to one case. *Webster* v. *Cooper*, 14 Howard U. S. Rep. 488. The Court say, at page 490, "A devise to the trustees and their heirs to the uses mentioned, carries the legal estate to the *cestuis que use*, unless the will has imposed on the trustees some duty, the performance of which requires the legal estate to be vested in them. And in that case they would take an estate exactly commensurate with the exigencies of their trust."

There is nothing for the three trustees to do, and the only purpose to be subserved by them was to hold the legal estate during the life of John M. Barr.

The dissipated habits of John M., no doubt suggested the idea of placing the fee beyond his control, in the trust-

ees, and there was a legal reason also; for, although there was a legitimate child *in esse* at the date of the will, yet there was a contingency to be provided for which might happen before the death of John M., to-wit, that there might be no child alive at the death of the testator—or that the child might not survive John M., in which event, the remainder to the sons-in-law was to vest. It was proper, therefore, that the fee should be so limited as to support this contingent remainder. But if we should agree with the plaintiffs, that the trust continued after the death of John M. Barr "to prevent the widow misapplying the estate, to the injury of the child or children," is there any reason why the fee should be retained in the trustees for that purpose? If the remainder, as we say, vests in the child absolutely at the death of the father, "do the exigencies of the trust" require the fee to continue in the trustees? Could the widow misapply the fee? Could she convey it or mortgage it, if it were vested in the child? Certainly not. All that she could misapply were the rents and profits, or the use of the farm during her life. All that was necessary was *a* power in the trustees to prevent such misapplication, and *this power*, without the legal title, would be, in the language of the Supreme Court of the United States, "commensurate with the exigencies of their trust."

It appears that the only duties remaining for the trustees, after the death of John M. Barr, were to *protect* the *existing* interest of the child in that farm. That implies that from the death of the father, and during the continuance of the life estate of the mother, the child had an interest to be protected. In point of fact, the estate in remainder was not only vested in interest, but *pro tanto*, in enjoyment. *That* was clearly *the intent* of the testator. He gives no such right of enjoyment, or participation in he use of the farm to the child or children during the life

of the father; but from the moment of John M. Barr's death, he says, if the wife survives and there is a child or children, the enjoyment of the estate shall be in both. And he is careful, as the plaintiffs say, to arrange a "conservative power," to watch over and "protect" it from misapplication by the widow. This very consideration seems to me to throw a strong light upon the question as to what was the intention of the testator in respect to the surviving child or children of his son. He intended to give them something more than a future interest, hanging on a contingency. He intended that they should have *everything*, right and possession, in this farm, upon the death of the father, if their mother were then also dead—and he intended to give them everything, if the mother survived, except her right *to participate* in the possession during her life. That is the only reasonable view which can be taken of his intention—for it is impossible to imagine a reason which could induce him to give the children a present enjoyment of the estate during the life of the mother, and yet make their title depend upon their surviving the mother. Brought to this test, we may safely say that this remainder, at the death of her father, vested in Maria Barr, not only *in right* but in *possession*, and became, in that child, a perfect and absolute estate, subject only, as to the mother, to a participation in that enjoyment.

We all agree that the devise to John M. Barr was simply an estate for life; and that the divise to his wife, Maria, was, also, an estate for life, contingent upon his leaving a legitimate child, and upon her surviving her husband. They admit that her life estate vested, and that, notwithstanding the death of the child, and her second marriage, it remained until her death.

The contingency of a legitimate child surviving John

M. Barr was expressly declared by the testator as a contingency upon which the life estate should vest in the surviving wife. It was a circumstance upon which, at least *one* estate in this farm was instantly to vest and to continue. *Eo instante*, with the decease of John M. Barr, the daughter surviving, the life estate of the mother became vested, and was not divested by the subsequent death of the daughter. Furthermore, the daughter was, by the same circumstance, vested with an interest in *that life estate of her mother*, for she was expressly entitled to maintenance and education from the farm.

This right to support and education from this farm during the life of the mother, which is, in effect, an estate in the farm during the life of her mother, did vest in the daughter.

We find, then, beyond question, that, at the expiration of John M. Barr's life estate, the circumstance of his leaving a legitimate child caused an express life estate to vest in the mother, and an implied life estate for the mother's life, to vest in the child.

The plaintiffs say no estate of any sort vested in the surviving child upon the death of John M. Barr. They admit this survivorship caused an estate to vest in the mother, which was not affected by the subsequent death of the child; but, they say, it was ineffectual to vest any estate in the child. Whatever obscurity there may be in the case, arises from the contingent life estate devised to John M. Barr's wife. It is clear,

1. That if John M. Barr had survived his wife, that upon his death the estate would have vested in the daughter.

2. That if John M. Barr had left no child, no life estate would have vested in his widow.

3. The devise of the life estate to the widow is made to

depend *solely* upon the contingency that a legitimate child shall survive the father. This child is the meritorious cause of the life estate in the farm given to the mother, and it is given charged with the support and education of the child. It is true, that upon the death of the child, the estate for life in the widow continues, notwithstanding the purpose or consideration upon which it was given had failed—for the estate for life having once vested, it must continue, there being no provision that it should cease on the death of the child.

4. Not only does the life estate of the widow depend on the fact that a child survives the father, but the estate *in remainder in fee* to the sons-in-law depends on the *same* fact.

By the express language of the will, this remainder in fee to the sons-in-law, after the expiration of John M. Barr's life estate, takes effect *only* upon the death of *that* life tenant "without leaving issue of his body."

If, therefore, no child had survived John M. Barr, the estate in remainder to the three sons-in-law in fee would have vested instantly on his death.

We see, therefore, that, at least, two estates in this farm contingent upon the death of John M. Barr vest, if at all, at the moment of his death. If he leaves a surviving child, an estate for life vests in the widow, and no remainder in this farm, either at that point of time, or at the expiration of the widow's life, vests in the sons-in-law. If he does not leave a surviving wife, then no estate for life vests in the widow, but instantly on his death the remainder in fee vests in the sons-in-law.

Now, it is perfectly clear that the testator intended that in the event that his son, John M. Barr, survived him, to direct how *the entire estate* in this should go.

He gives to his son only a life estate, but he intends to

dispose of *the remainder in fee.* He does not mean that this remainder shall be left, on the death of his son without issue, to go by descent to his (the testator's) heirs. He deliberately changes the course of descents, by giving this remainder to persons not of his own blood, or in the line of descent from him. Mark, however, that he says expressly, that this remainder in fee to the sons-in-law is only to vest in case no child survives John M. Barr. He has in his contemplation an estate of remainder in fee after the termination of his son's life.

He has also in contemplation two classes of persons, to-wit, such issue of his son as may then be *in esse*, as one class; and he says expressly, that at that point of time—and upon the happening of that event—the remainder in fee in this farm shall go to one or the other of these two classes, and of the two, the issue is preferred. That class is the primary object of his bounty. This express devise of the remainder to the surviving issue at the death of the son, is again repeated in another clause of the will. All through these clauses the condition of things at the death of the son, is to regulate every devise. This is admitted by the other side as to everything except only the remainder to the issue in the event that the wife survives; and, as to this, they claim that then the issue which has survived the father only prevent the remainder from going to the sons-in-law, but do not take it themselves, until another event happens, to-wit, the death of the mother the issue still surviving. But how does it happen that the testator, who has so carefully marked out the alternative classes to take this remainder on the death of the son without surviving issue, makes no provision or devise of such alternative remainder on the death of the wife, without child or children then surviving? Is there a word in this will about any surviving issue of the wife, or of the

husband, at the death of the wife? On the contrary, the very language is, "if my son leave but one child." Again—"But if he leave two or more children, then I give," etc., and again, "But should my said son John M. Barr die without leaving any issue of his body, then, and in that case, I do give," etc. Clearly, the remainder vested *in right*, in the daughter at the death of the father; but could not vest in full and exclusive *possession* until the death of the mother.

But if we admit that the estate to the children of John M. Barr depended on the contingency of their surviving both their parents, is that such a contingency as postponed the *vesting* of the estate until it should happen?

We say it was not, but, on the contrary, the remainder dependent upon the expiration of both the life estates, did become a vested remainder in John M. Barr's legitimate daughter before the death of either parent. This daughter was *in esse* at the date of the will and at the death of the testator. At the very moment that the will took effect upon the death of the testator, the estate in remainder to that child *vested;* whether it was to come into possession on the death of John M. Barr, or on the death of both parents.

The clearest statement of the doctrine of vested and contingent remainders which I have met with anywhere, is contained in the Opinion of the Judges delivered in the House of Lords by Chief Justice WILLES, in *Dormer* v. *Parkinson*, reported in 3 Atkins, 139. It is as follows:

"We have considered this point a good deal and are of opinion, that all contingent remainders may be reduced to these two heads: *first*, where a remainder is limited to a person not in being, and who may possibly never exist—and, *secondly*, where a remainder depends upon a contingency collateral to the continuance of the particular es-

tate. I will give an instance of this. If an estate be limited to A for life, the remainder to his first son before he has any child, this is a contingent remainder of the first kind, for it is uncertain whether he will have any son. If an estate is limited to A for life, and after the death of J S, to R in fee, or after J S shall return from Rome: this is a contingent remainder of the second kind, for it is uncertain what time J S shall die, or shall come from Rome. For as the law, for many good reasons, will not permit the freehold to be in abeyance, it expects the contingent remainder to take place when the particular estate determines, and it can not immediately vest in those cases, when it is uncertain whether the contingency will happen."

It is clear that our case does not fall within either of the two classes of contingent remainders above defined.

First. The remainder is expressly given to the legitimate child or children of John M. Barr, at the expiration of his life estate—or if his wife, Maria, survive him, then upon the expiration of her life estate. John M. Barr had a legitimate child in being at the date of the will and at the death of the testator. There was, therefore, no uncertainty or contingency as to whether John M. Barr should have a legitimate child—and the case does not fall under that particular class of contingent remainder.

Second. The remainder did not depend upon any contingency collateral to the continuance of the particular estate,—or, more properly speaking, in reference to our case, of the two particular estates.

It is well to observe here, that the uncertainty whether the remainder-man will survive the tenant for life, and be *in esse* when the particular or life estate expires, is not the sort of contingency which makes the estate in remainder contingent, for if that were so, *all* estates in remainder would be contingent remainders. What the law requires

to constitute a vested remainder, is: first, a person capable of taking the estate in remainder; and, second, a particular estate certain to terminate at some time, and such a remainder limited upon it as must take effect, if at all, upon the expiration of that particular estate.

But if the remainder depends upon a contingency collateral to the particular estate, which may or may not happen before the particular estate expires, *that* is not a vested remainder, for it is impossible to say whether the collateral contingency will happen during the continuance of the particular estate.

It may not happen till afterwards; but then, when it does so happen afterwards, it is too late for the remainder, which has failed for the want of a particular estate to support it—for the law, as C. J. WILLES says, "will not permit the freehold to be in abeyance."

I will here consider, more in detail, the limitations contained in the will.

First, there is a devise of the land to the son, John M. Barr, for life.

Second, in case the son should die leaving a legitimate child or children, then to his wife, Maria, if she should survive him, for her life, for the maintenance of herself and said child or children, and the educating of said child or children. Up to this point there is no direct devise to John M. Barr's surviving child or children. Let us suppose the limitations had gone no further, what estate would Maria Jane Barr, the daughter, have taken?

I have said before that her right of support and education from the proceeds of the land gave her, during her mother's life, a joint life estate with the mother. That was an interest, or estate, that vested at once *in possession* on the death of her father; but had she no other estate beside that life estate during her mother's life?

Clearly, she had no other estate by direct descent from her father, but might have had an undivided interest of one fourth, in common with her three aunts, the sisters of her father, and *that* she would only take upon the ground that beyond the devise of the life estate to her father, and the contingent life estate to her mother, the testator had died *intestate* as to the remainder, upon the determination of those life estates. It would seem, that under this limitation, she would have taken more than this life estate; and that, by implication, she would have taken the remainder as a vested estate, upon the death of her father. We need not spend further time upon this point, but will proceed to the next limitation.

Third, "And upon the decease of the said Maria Barr, if she survive her husband; if not, then upon the decease of the said John M. Barr, I do further give and devise the remainder of my estate in said farm unto the legitimate child or children of the said John M. Barr and their heirs forever." This is very explicit; for here is an express devise of the remainder in fee to the child or children of John M.

The will then proceeds as follows: "If my said son leave but one child, as aforesaid, then I give and devise the said farm to him or her, or his or her heirs forever; but if he leave two or more children, then I give and devise the said farm unto such children and their heirs, to be equally divided between them; but should my said son, John M. Barr, die without leaving any issue of his body, then, and in that case, I do give and devise the remainder of my estate in said farm unto my said sons-in-law, Wm. Barr, James Keys, and John B. Ennes and their heirs forever."

Here is a repetition of the remainder to the child or children of John M. Barr. The construction on the other

side is, that this devise to the child or children was only to take effect upon such child or children surviving the mother. The turning point of the limitations is the state of things *at the death of John M., the son.*

It is just then that the remainders are to take effect, if at all. If a child or children are then *in esse*, the remainder limited to them, then takes full effect. If there is no such child at that time, the remainder to the sons-in-law, then takes effect.

Now, although we have argued that the remainder to the child or children was a vested remainder from the date of the death of the testator, yet it was subject to be divested on the death of such child before the death of John M.; for, at that point of time, the remainder to the three sons-in-law is given, if no child then survives.

The estate of the child was, therefore, vested from the beginning, but belonged to that class of vested remainders which are subject to a condition subsequent.

But as the child survived the father, as the condition subsequent did happen, from *that* point of time the remainder became absolute; for it was not carried along, to await the expiration of the life estate of the wife.

No remainder over to the sons-in-law, or other persons, was limited upon the death of the wife—so that the death of the child, after the death of the father and before the death of the wife, did not carry the remainder to the sons-in-law, but it passed inevitably in the line of descent from the child, as fixed by the statute.

The case of *Carver* v. *Jackson*, 4 Peter's Rep. 1, is almost identical with this case. That case was upon a marriage settlement of the lands belonging to the wife, made on the eve of the marriage, by the intended husband and wife, conveying the wife's lands to trustees for the use of

the husband and wife, and the survivor of them, for their lives, and "after the determination of that estate, then to the use and behoof of such child or children as may be procreated between them, and to his, or her, or their heirs and assigns forever;" but in case the said parties "shall have no child or children begotten between them, or that such child or children shall happen to die during the life of said parties, and the said Mary" (the wife) "should survive the said Roger" (the husband) "without issue, then to the use and behoof of her, the said Mary, and her heirs and assigns forever." And in case the said Roger should survive the said Mary without any issue by her, or that said issue is then dead without leaving issue, then, after the decease of said Roger, to such person or persons as said Mary may by last will appoint.

There were children of the marriage, and the question was, whether the estate in them was a vested or contingent remainder during the lives of the parents—for if only contingent, it was destroyed by an attainder which put an end to the life estates.

The Court held, that the remainder to the unborn children was contingent until the birth of a child, and then became vested. The Court adds: "It is perfectly consistent with this limitation (that is of a vested remainder) that the estate in fee might be defeasible, and determinable upon a subsequent contingency; and upon the happening of such contingency might pass, by way of shifting executory use (as it might in case of a devise by way of executory devise) to other persons in fee, thus mounting a fee upon a fee."

This applies in our case to the devise over of the remainder, upon the death of John M. Barr without leaving issue, to the three sons-in-law in fee. That shifting devise does not make the remainder to the children contingent.

Undoubtedly, one of these alternative remainders must be contingent, for they can not both be vested at the same time—but, as is said by the Court—"the contingency would attach, not to the preceding limitations" (the remainder to the children) "but to the executory use over"—that is to say, to the limitation in that case to the wife in default of issue, and in this case, to the three sons-in-law at the death of John M. Barr, without issue.

The devise over to the sons-in-law is upon the contingency that John M. Barr shall die "without leaving any issue of his body."

The contingency applies to the limitation to *them*, and not to the limitation to the child or children. In this particular, our case also resembles the case in Peters—as to which the Court say—"Now, it is important to observe that this clause does not attach any contingency to the preceding limitation to the children, but merely states the contingency upon which the estate over is to depend. It does not state that the children shall not take unless they survive their parents, but that the mother shall take, in case she survives her husband without issue. She, then, and not the children, is to take in case of the contingency of her survivorship. It is applied to her and not to them."

There is a further analogy between the two cases, in this: that it was contended in the case in Peters, as it is contended by the plaintiffs in this case, that the child or children must survive both parents—that is, they must survive not only that one of the parents who was the meritorious object; but also the other parent who stood in no other relation to the estate than as consort of the meritorious party. In the case in Peters it was the wife who was the meritorious party—in our case it was the husband. Upon this point the Court say:

"Another difficulty in the construction contended for is, that the children must survive both the parents, and that if they should survive the mother and not the father, in that event they could not take; yet the settlement plainly looks to the event of the death of the mother without issue as that alone in which the estate over is to have effect." Surely, in our case there can be no question that the will, "plainly looks" to the event of the death of the father without issue, as that alone on which the remainder over to the sons-in-law is to have effect. There is no possible event on which that estate over can have effect, except only the event of a want of issue at the death of John M. Barr; for it is limited upon that event by language too clear to admit of doubt.

The Court proceed: "It is also the manifest intention of the settlement, that, if there is any issue, or the issue of any issue, such issue shall take the estate, which can only be by construing the prior limitation in the manner in which it is construed by this Court." That is to say, by construing the prior limitation to be a vested remainder. This is a controlling consideration in the construction of this will. No one can doubt the intent of the testator, that this farm should go to John M. Barr *and his descendants.* They stand in the line of descent from him, and are the only persons in the line of descent from him, who come within his cognizance in so far as this farm is concerned; for the devise over is to persons not in that line. If the prior limitation to the child or children was contingent, and only vested on the event of their surviving one, or, as they say, both parents, then it would follow that a grandchild of John M. Barr could not take, if his child had died during his life, or the life of his surviving wife. We all agree that this prior limitation was not an entailment coalescing with the estate devised to John M. Barr

and dependent upon it, but was an independent limitation, and, consequently, if this prior limitation never took effect and never became vested in the child or children, it could not pass by descent from such child or children. So that, upon the construction claimed in this case for the plaintiffs, if the daughter, Maria Jane Barr, who survived her father, had lived to be forty years of age, to be married, and had then died leaving children, these children could not take, for their grandmother, Mrs. Bigelow, still survived. Nothing but the most plain language—the clearest intent—could authorize a construction which would lead to such a result.

One more extract from the opinion in 1 Peters. "The general rule of law, founded on public policy, is, that limitations of this nature shall be construed to be vested when, and as soon as, they may. The present limitation, in its terms, purports to be contingent only until the birth of the child, and may then vest. So that, whether we consult the language of the settlement, the order of its provisions, the apparent intention of the parties, or the general rule of law, they all lead to the same results—that the estate of the children was contingent only until their birth, and that when the act of 1779 passed, they being all then born, it was a vested remainder in them and their heirs, and not liable to be defeated by any transfer or destruction of the life estate."

I have called attention to the fact that the estate for life to the surviving wife of John M. Barr, and the estate in remainder to the three sons-in-law, both depend expressly upon the state of things at his death.

If these estates vest at all, they vest then. They hang upon the contingency, whether or not, *at that time*, there is a surviving child. The argument, on the part of the plaintiffs, turns upon a single clause, and makes the re-

mainder to the surviving child of John M. depend upon an additional contingency—that is to say, the state of things at his wife's death, if she survive her husband. We must read this clause by itself, and without reference to any other clause, and read it very literally to suit their argument. The clause is in these words: "And upon the decease of the said Maria Barr, wife of the said John M. Barr, in case she survive him, if not, then upon the decease of the said John M. Barr, I do further give and devise the remainder of my estate in said farm unto the legitimate child or children of the said John M. Barr and their heirs forever." If the limitation of the estate in this farm had stopped with this clause, their being no limitation over upon the contingency that no legitimate child of John M. should be *in esse at the death of the mother*, I would maintain that the remainder did vest, *in right*, in the child upon the death of the father, and was only postponed, *in possession*, until the death of the mother. We look in vain for any language expressing an intent, that if the child survived the father, it must also survive the mother in order to be vested with the remainder. *That* could never have been the intent of the testator, for such a construction would cut out a grandchild surviving the mother, from this estate in remainder. It is probable, nay, quite clear, that the testator did not consider the contingency of survivorship of this child in any relation except to the father, John M., and that the contingency of survivorship between the mother and the child did not occur to him. He, perhaps, took it for granted that the child which had survived the father, would survive the mother. Anyway, he made no provision for a remainder in this farm, upon that contingency—but was very careful to make such provision, by subsequent clause, to take effect at the death of the father.

All doubt as to intention seems to me to vanish when we come to the next clause.

"If my said son leave but one child, as aforesaid, then I give and devise the said farm to him or her, or his or her heirs forever. But if he leave two or more children, then I give and devise the said farm unto such children and their heirs, to be equally divided between them. But should my said son, John M. Barr, die without leaving any issue of his body, then, and in that case, I do give and devise the remainder of my estate in the said farm unto my said sons-in-law, William Barr, James Keys, and John B. Enness, and their heirs forever."

This is the clause in which the testator contemplates solely the estate in remainder in this farm. He had provided before for a fixed life estate in his son, and a contingent life estate in the wife of that son. Next, the remainder is to be disposed of. He determines that it shall go in one of two ways.

But when and to whom? It must go either to the surviving child or children of his son, or to his three sons-in-law. The first class is in the direct line of descent from himself—the other class is not of his blood. Accordingly, he prefers the first, if there is such a class to take; but, if not, then the remainder goes to the second class. There is, then, no question as to the persons who are to take, or as to the order of succession in which they stand. Next, as to the question *when* they are to take? What event settles this alternative, whether the remainder shall go to the first class or to the second class?

It is, inevitably, the state of things at the death of John M. Up to that point of time the remainder is alternative, but at the instant of his death it ceases to be alternative.

The doubt which was not solved before, as to which of these two classes should take the remainder was solved

then, by the death of the tenant for life leaving a legitimate child. *That*, at least, was clear. It stood fixed that one of the two classes—that is to say, the sons-in-law—could never take this remainder, not even if the child had died the next day or the next hour. But this event, which destroyed the remainder as to the sons-in-law, did not destroy the remainder itself. That remained to take effect, and to vest at the proper time. The class or person to take was then *in esse*. Was not this the proper time? Now, consider that the testator had within his expressed purposes, as to this estate in remainder, only two objects of his bounty. He intends to give it to one or other of the two for he does not devise it over to a third, upon any contingency. He says, in effect, that, if at the death of his son, a legitimate child of that son survives, the sons-in-law shall not take this remainder, *then or at any future time*. But if he meant that at that time the child should not take the remainder—if he meant to suspend the vesting of this remainder in the child, for a further indefinite time—if he intended that the contingency which held the remainder in suspense during the life of the father; that is to say, the survivorship of the child, should continue during the life of the mother, how did it happen *that he did not carry the alternative along with this second contingency?* Why did he cut off the sons-in-law at the happening of the first contingency? Why did he not give them the benefit of the second contingency, as well as the first? The answer is inevitable—*he intended no second contingency*—and, therefore, made provision for no second contingency.

Nor can it be argued, in answer to this, that inasmuch as the testator, by a subsequent clause in the will made these three sons-in-law his residuary legatees, there was no necessity of devising the remainder of this farm over

to them, upon the death of John M. Barr's wife—she surviving her husband and no legitimate child of his surviving her. After various bequests of other property, the testator devises as follows: "Also, I do further devise and bequeath the remainder of my estate, both real and personal to my sons-in-law, William Barr, James Keys, and John B. Enness."

Now, although by force of the words "the remainder of my estate," the remainder in fee in this farm might pass, yet, it is manifest, for many reasons, that the remainder in fee in this farm was not intended by the testator to pass by this clause—for, *First*, this devise of the remainder of his estate is in language *in presenti*, and applies at once on his death. It is not put as a remainder to await any contingency. *Second.* The testator clearly distinguished between the remainder in the farm, and the remainder in his general property, real and personal. He gives the first remainder to his sons-in-law contingently. He gives them the other remainder absolutely. *Third.* There was no necessity for the devise of the remainder in this farm to the three sons-in-law at the death of John M Barr without issue, if it were the intention of the testator to include *that* remainder, in the general remainder. Consequently, the construction, urged on the other side, would make the first and special devise superfluous. *Fourth.* To suppose that the testator intended the remainder in this farm to pass by the general clause, is to suppose that he contemplated *an intestacy* as to the farm, notwithstanding it was the chief subject matter that he undertook to dispose of.

The considerations already stated seem to me conclusive in favor of the vesting of the remainder in the surviving child at the death of the father, but the full force of the argument is not yet given. There is other lan-

guage in this will—other cogent expressions, used again and again, which fix the death of this son, and not the death of his daughter-in-law, as the time when this will speaks—as the time when, once for all, *this* remainder is to vest. I here refer to those clauses which follow the first devise, in favor of the child or children of John M., and which I must again quote.

"If my said son leave but one child, as aforesaid, then I give and devise the said farm to him or her, or his or her heirs forever. But if he leave two or more children, then I give and devise the said farm unto such children and their heirs to be equally divided."

There is much matter in these clauses worthy attention—but first let me notice an argument, or inference, drawn by Mr. EWING from the phrase "as aforesaid."

This phrase is said to refer to such a child as, according to the prior clause, shall survive the mother, as well as the father. Or, in other words, a child who shall survive the mother "as aforesaid." Surely, it is only necessary to read that prior clause to see, at once, the natural application of the "as aforesaid." In that prior clause, the testator carefully added the qualification "legitimate child." When, in the next clause, he speaks of "one child, as aforesaid," he means, simply, a child answering the same description; not a child generally, but "as aforesaid," that is, a legitimate child.

Now, first, observe that the mother of the child is not so much as mentioned in these special clauses. The father and surviving child or children of the father are here only, under the cognizance of the testator. The devise is to the child or the children which his son may leave. Leave, when? What is the obvious meaning? What is the point of time to designate this devisee or these devisees? The death of the father, or the mother?

The testator makes it all clear—if it were not clear enough already, by the next succeeding clause. "But should my son, John M. Barr, die without leaving any issue of his body, then, and in that case, I do give and devise the remainder of my estate in the said farm unto my sons-in-law," etc.

Let us again recur to these clauses, and mark the language, "if my said son leave but one child," and, again, "if he leave two or more children," "then I give and devise the said farm," etc.

To suit the construction contended for by the other side, not one word of these clauses has any meaning or effect. We must add to them a qualification which destroys their operation, as they stand. We must read them as follows: "if my son leave but one child, *and that child should survive the mother*, then I give the remainder to that child. Or, if my son leave two or more children, and those children survive the mother, then I give the remainder to them." If we are to read the will in that way, then these consequences are inevitable: *First*, that a grandchild of John M. Barr could not take: *Second*, that in default of a child surviving the mother, the remainder in this farm was not devised over, but would lapse into the residuary clause, which was not intended to carry it.

Hitherto, I have endeavored to show that the remainder to the daughter was limited, on the death of the father, John M. Barr. But, if it were otherwise—if the remainder was also limited upon the death of the mother, it would still vest in the daughter before the death of the mother, and would descend to the heirs-at-law of the daughter upon her decease prior to her mother. Even with that construction of this devise, it is perfectly clear upon the authorities, that, as the person to take the re-

mainder was *in esse*—and as it was limited upon an event that was sure to happen, it did vest, and would not be divested by the death of the daughter before the death of the mother. It did not belong to that class of vested remainders which are defeasible by condition subsequent, for there was no devise over upon the happening of the condition subsequent. This remainder is given to the child or children in fee, and the limitation of the remainder stops there.

I will now refer to some authorities upon this point.

Goodtitle v. *Whitby*, 1 Burr Rep. 228, is a leading case, frequently quoted. It was upon a devise in fee to trustees of all the lands of the testator "in trust, that they and the survivor of them, his heirs and assigns, should lay out, employ, and bestow the rents and profits of the devised premises for the maintenance, education, bringing up, and putting forth into the world of Thomas and John Hayward, sons of the testator's sister Elizabeth Hayward, during their minorities, and when and as they should respectively attain their ages of 21, then to the use and behoof of the said sons of his sister Hayward, the said Thomas Hayward and John Hayward, and their heirs equally." One of those nephews, Thomas, died under 21, without issue—the other attained that age.

Lord Mansfield, delivering the opinion of the Court, says:

"Here it is agreed that a fee is devised to the nephews, but it is made a question whether it be a fee depending upon a precedent contingency or an immediate fee. Where an absolute property is given, and a particular interest given in the meantime, as until the devisee come of age, and when he shall come of age, then to him, the rule is, that that shall not operate as a condition precedent, but as a description of the time when the remainder-man

is to take possession. And this is sufficient to answer the intention of the testator—the devisee does not want it in the meantime. Here, upon the reason of the thing, the infant is the object of the testator's bounty—and the testator does not mean to deprive him of it in any event. Now, suppose that the object of the testator's bounty, marries and dies before his age of 21, leaving children, could the testator intend in such an event to disinherit them? Certainly he could not—and as to the testator's heir-at-law, he is only to take what the testator has not devised away from him."

It was held, that the property was given absolutely and "the limitation was only of the trust," and that it was "an immediate gift to the two nephews, with a trust to be executed for their benefit during their minority."

In the case just quoted there was, as in our case, a limitation of the fee to the trustees—and also a devise of the remainder in fee to objects of the testator's bounty. In that case, as in ours, there was no devise over of the remainder. In that case it was held that, as the whole estate was given in remainder, the particular interest given out of it to the trustees only operated by way of exception. In our case there is an additional particular interest, in the limitation of the life estate to Mrs. Barr—which must also operate only as an exception out of the absolute grant.

In that case the contest was between the heir-at-law of the testator and the heir of the deceased devisee. In our case the contest is between the heirs of the sons-in-law, and perhaps the heirs of the testator, on one side, and the heirs of the deceased child on the other side.

The rule I have referred to is yet more distinctly stated by the Chancellor in *Moore* v. *Lyons*, 25 Wendell, 143, as follows: "The determination of this question does not

necessarily depend upon the fact of the remainder being *vested in interest* at the death of the testator, for where a remainder is so limited as to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to be determined by an event which must unavoidably happen by the efflux of time, the remainder *vests in interest* as soon as the remainder-man is *in esse* and ascertained; provided, nothing but his own death before the determination of the particular estate will prevent such remainder from vesting in possession. *Doe* v. *Nowill*, 1 Maule & Sel., 327. Yet if the estate is limited over to another in the event of the death of the first remainder man before the determination of the particular estate, his vested estate will be subject to be divested by that event, and the interest of the substituted remainder-man, which was before either an executory devise or a contingent remainder, will, if he is *in esse* and ascertained, be immediately changed into a vested remainder."

I will next call attention to some cases, not hereinbefore cited, in favor of the grounds taken on behalf of the defendants.

Moore v. *Lyons*, 25 Wendell, 119, was upon a devise of a house and lot in the City of New York to a negro woman named Mary, "to have and to hold the same unto her, the said Mary, for and during her natural life, and from, and after, her death, I give and devise the said dwelling-house and lot of land to Susan, Jane, and Betsey, three daughters of said Mary, or to the survivors or survivor of them, their or her heirs and assigns forever." The case was first decided by the Supreme Court of New York—that Court holding, that the remainder was given to such of the three daughters as might survive at the death of the tenant for life, and, consequently, it was a contingent, not a vested remainder. (Page 120) The Court of Er-

rors, however, after a thorough examination of all the cases, held that it was a vested remainder—and, after full opinions, delivered by BRADISH, VERPLANK, and Chancellor WALWORTH, all concurring in the decision, reversed the judgment of the Supreme Court, by a vote of 13 to 3. The Chancellor says, that "a remainder is not to be considered as *contingent* in any case where it may be construed to be vested, consistently with the intention of the testator. The adverbs of time, therefore, such as *when*, *then*, *from*, and *afterward*, etc., in a devise of a remainder limited upon a particular estate, determinable on an event which must necessarily happen, are construed to relate merely to the time of the enjoyment of the estate, and not to the time of its vesting in interest."

This doctrine applies very well to the adverb of time used in William Barr's will, if, indeed, that adverb is applied to mark the time of Maria Barr's death. The words are—"and upon the decease of said Maria Barr, wife of the said John M. Barr, in case she survive him; if not, *then* upon the decease of the said John M. Barr, I do further give and devise the remainder of my estate in said farm unto the legitimate child or children of the said John M. Barr and their heirs forever." It will be seen that the adverb of time, "*then*," is affixed to the date of the death of the father, not of the mother—but, if it had been affixed to the date of the mother's death, it would, as we have seen, only have served to mark the time when the remainder was to come into enjoyment, and not the time when it was to vest in interest. This construction, as to the meaning of these phrases, as shown by the Chancellor, is as old as *Boraston's Case*, 3 Rep. 19. But when we apply this adverb of time to the period of the father's death, there is not the shadow of a contingency affixed to the period of the mother's death. The devise in the case

of *Moore* v. *Lyons* had a much stronger leaning towards a contingent remainder than the devise in our case—not only from the use of the terms *from and after*, but espepecially from the clause declaring a survivorship among the three devisees of the remainder. The most obvious construction as to a devise to three persons from and after a future event, or to the survivors of them, would seem to be, that such of them, only, as should survive the event, would take—and such construction would make the remainder contingent until the happening of the event. But a long list of cases had fixed the construction of such a devise to mean a survivorship at the death of the testator—thereby vesting the remainder as of that date. And, furthermore, declaring that a subsequent death of a remainder-man before the termination of the particular estate, or the happening of the event on which it was to vest in possession, would not divest his remainder, or carry it over to the survivors. These decisions, which are founded on an enlightened view of the intention of testators, and upon consideration of the consequences which would result from a different construction, have established the wholesome rule that a remainder is always to be considered vested, where such a construction is at all admissible. I need not refer at length to all the consequences which attach upon a contingent remainder, but will only mention one, in reference to the devise in *Moore* v. *Lyons*, equally applicable to our case. The mother and her three daughters were the sole objects of the testator's bounty, in that case, for there was no devise over of the remainder in the house and lot to any other person. If they had all died during the life of the mother, leaving children, not one of the children would have taken, if the remainder had been construed as contingent. Again, the devise of the remainder was to the three daughters and their heirs, precisely as in our

case—but if it had been construed to be contingent, and one or two of the daughters had died before the mother leaving children, the surviving daughter would have taken all. When William Barr devised the farm to his son for life, with remainder to the child or children of the son and "their heirs forever," his *intent* is that the fee shall go to the child and *its descendants*. He never intended that the death of the child before the date when the remainder should come into possession should leave the issue of that child unprovided for.

Mr. EWING refers to the doctrine as to the respect paid to the *general intent* of the testator, where there is also a subordinate or *particular intent*, and says, that "one recognized general intent is to keep the devised estate in the family of the testator as long as the rules of law and the tenor of the devise will permit." Very well; I do not object to the rule, as I stated, if only the term "family" is to be understood as referring to the descendants of the testator, and as not embracing such a class of persons as "sons-in-law." Apply the rule here and we find the intent to be that this remainder shall go to his granddaughter, and to her children, all of whom are his descendants, rather than to his "sons-in-law," who did not belong to his "family" even in a popular sense. It so happened, in our case, that the daughter died without issue, during the life of her mother But construction of devises is to get at an intent *ab origine*. An intent which exists before possible events have happened, and which, therefore, exists in view of uncertainties The question, for instance, in this case, is not what William Barr would have provided as to this remainder if he had been certified that his son would leave a legitimate child which would die before the mother without children. But the question is, in view of the uncertain future, was

it his intent that if the daughter survived the father, and died before the mother, leaving children, those children should take? Surely, he intended that they should take. The unborn children of his son are just as fully the objects of his bounty as the single child then *in esse*, and so, too, when he gives this remainder to those unborn children and their heirs—all in the line of descent from himself, he intends to comprehend them all. If that was his purpose, it follows, inevitably, that this was a vested remainder in Maria Jane Barr.

And such would be the result, even if it were a remainder which would otherwise go to other descendants of the testator—but that does not happen to be the case here—for here it would go to his three sons-in-law, as their absolute property. So that, when we look for an intent in this will, concerning this remainder, the question to be settled is, whether William Barr intended to prefer his sons-in-law, to his own lineal descendants.

The next case to which I will refer is, also, from New York—*Williamson* v. *Field*, 2 Sand. 533, decided by Vice Chancellor SANFORD, in 1845. This case gives a very full view of the modern English cases upon the subject of vested and contingent remainders, and is in other respects entitled to great consideration. It was upon a devise of land to trustees in fee, to receive the rents and profits and pay them to Thomas B. Clarke (a natural son of the testator's son Clement), "during his natural life, and from and after the death of the said Thomas B. Clarke in further trust to convey the same to the lawful issue of the said Thomas B. Clarke living at his death, in fee, and if the said Thomas B. Clarke shall not leave any lawful issue at the time of his death, then to convey the said hereby devised premises to my said grandson, Clement C. Moore, and to his heirs, or to such person in fee as he may by will

appoint, in case of his death prior to the death of the said Thomas B. Clarke."

It will be noticed, that in the foregoing case the fee, as in our case, was devised to trustees. As to that, the Chancellor says: "The circumstances that the legal title was given to trustees, makes no difference in the construction and need not be again mentioned on this point."

On page 352, the Chancellor says: "Now, in this case, the event was certain, for T. B. Clark was certain to die. The person was determinate as soon as a child was born to him. The interest in remainder was, doubtless, contingent as to the children before it was known that Clarke would have issue. The unborn children had a right by way of springing use, and it was until their birth, a possibility only. But whenever a child is born to whom a remainder has been previously limited, such remainder then vests in the child, if he be certain to take it by the terms of the gift. Each child of Clarke was certain to take unless his estate should be afterwards divested in Clarke's lifetime." In that case, there being, as in our case, a devise over of the remainder to another party, if no children survived the father, the children born before the death of the father had precisely such an estate as Maria Jane Barr had during the life of her father—that is to say, a vested remainder, subject to be divested by her death before her father in virtue of the devise over, upon *that event*, to the three sons-in-law.

I again quote from the Chancellor, on page 553. "It is the present capacity of taking effect in possession, if the possession were to become vacant, not the certainty that it ever will become vacant while the remainder continues, which distinguishes a vested from a contingent remainder. In other words, in the former the *enjoyment* is uncertain—in the latter *the right* to that enjoyment.

Thus, in this case, in 1820 there was no certainty that Bayard Clarke" (one of the children) "would survive his father, and his remainder might, therefore, cease before the possession became vacant. This was no test of its character. But at that very time, if the possession had become vacant by the death of T. B. Clarke, Bayard Clarke's remainder had a present capacity to take immediate effect."

Again, on page 562: "The direction that the trustees are *to convey* the property to the issue of Clarke living at his death, in no manner affects the point. The issue would be deemed, in equity, as having the whole interest after the death of Clarke, without any regard to a conveyance of the legal title—and the objects of the trust having been accomplished, the estate would now be held a legal estate in those entitled under the will."

The Chancellor states his conclusion to be that the children had, during the life of the father, "a vested equitable remainder in fee simple."

The next case is from Kentucky—*Danford* v. *Talbot's adm'r.*, 7 Ben Monroe, 623. This case was upon a will containing, first, a devise to trustees, and as to his home farm, to the use of the testator's wife for life reserving a room for his daughter Ann. Then, by the 7th item he provides that, "on the decease of my said wife, the above-described farm shall become the property of my son Cyrus, when arrived at the age of 26 years (excepting the reservation in favor of Ann), but after providing for the support and comfort of his mother, he may be entitled to all the profits arising from the same, except the reserved rights of his sister Ann."

This case resembles our case in that feature which provides for a participation by the remainder-man in the pro-

fits of the farm during the currency of the life estate—but in respect to the limitation of the remainder, is more complicated. It is limited on two events—the decease of the mother, and the attaining to the age of 26. It was held to be a vested remainder. The son, conveyed his estate in remainder and died before he was 26—but the title of his grantee was sustained. This limitation upon an event which may never happen sounds much stronger *in contingency*, than the limitation in our case, which is upon an event that must happen. *Marshall, C. J.*, delivering the opinion, says:—"And although the event referred to, that is the arrival of the son at the age of twenty-six, must, when abstractly and precisely considered, be regarded as uncertain and contingent, must it be assumed to have been so regarded by the testator? He evidently did not regard it as contingent. He speaks of it as a thing certainly to happen. He does not say, if he shall arrive—but when arrived at the age of twenty-six—*and he makes no devise over* upon the event not happening, as he would almost certainly have done if he had regarded the happening of the event as uncertain, or its not happening as a contingency which would give a different direction to the estate."

Blanchard v. *Blanchard*, 1 Allen, 223, was decided by the Supreme Court of Massachusetts as late as 1861. It was upon a devise of land and personalty to the testator's wife for life, and to his five children of "all the property both real and personal that may be left at the death of my wife, to be divided equally between the last five named children—and provided furthermore, that if any of the last named five children die before my wife, then the property to be equally divided between the survivors, except they should leave issue, in that case to go to said issue, provided the said issue be legitimate."

The Court held that each of the children took a vested remainder, subject to be divested by the limitation over, in case either of them died, either with or without issue, in the lifetime of the mother.

Foster v. *Wick*, 17 Ohio Rep. 250, was upon a devise in these words:—"And the farm and town property rented to Thomas L. Wick, deceased, I will to the three children of Thomas L. Wick, providing they live to legal age." In a subsequent clause the testator adds, "If said children all die before they arrive at legal age, this will as respects them to be void, as I wish none but my blood-kind to enjoy my property."

The will, as is evident, was very inartificially drawn, but it was the intention of the testator to provide for a survivorship among the children, and to provide how the estate shall pass, if all the children should die before majority. The condition is stated very strongly to mark a contingency—indeed I have seen no case with a stronger condition—but nevertheless, our Supreme Court held that the estate *vested* in the children before their arrival at age, and that they had such a legal title as would support an ejectment—subject to be divested by their death before their majority.

I admit that this case seems to have been decided without much examination, and is therefore not entitled to so much consideration as some of the prior cases. No arguments are reported—nor does it appear that any cases were cited by counsel or referred to by the Court.

But it is nevertheless entitled to weight as a decision in Ohio, where the farm now in controversy is situate—and it shows how strongly an Ohio Court leans in favor of the vesting of estates.

It does not seems to be necessary to cite more decisions though there is a long list, English and American, that

look the same way, especially as the plaintiffs have not been able to find a case which establishes a contrary doctrine.

It remains only to recapitulate the grounds on which we rely under this branch of the case.

1. That the remainder to Maria Jane Barr was at no time a *contingent* remainder, she being *in esse* at the death of the testator.

2. That it was from the first a vested remainder—but during the life of the father was subject to be divested in the event of her not surviving her father and by force of the devise over to the sons-in-law on that event.

3. At the death of the father this vested remainder became absolute—and fully vested *in right*, though postponed as to *enjoyment* until the death of the mother—but not defeasible, as before, on her death during the life of her mother. Having shown that Maria Jane Barr was vested with this remainder at the date of her death, she dying intestate, we are brought to the only remaining question in the case, and that is, to whom did it descend.

We agree on both sides that the statute of descents that rules this case is the Act of December 30, 1815, 2 *Chase* 906.

This act was in force at the date of the will, at the death of the testator, and at the death of Maria Jane Barr.

It provides, on intestacy, for the descent of real estate, distinguishing between such estates as came to the intestate by descent, devise or deed of gift from an ancestor, and such as did not, but came by purchase. As this farm came to Maria Jane Barr by devise from her paternal grandfather, we must look to that clause which provides for the case of devise from an ancestor.

In the first place, there is no question that this estate came to Maria Jane from her grandfather and not from her father. The devise of the remainder was to her directly, and not through the father. She took nothing in this farm from her father, for he never had any interest in it, except an estate for his own life.

Nor can there be any question that the grandfather of the intestate was her ancestor within the meaning of the statute, and that the phrase is not to be limited to the *immediate* ancestor, the father or mother of the intestate. Even at the common law it is not confined to the immediate parents, but to all those who are higher in the direct line, and as used in our statutes of descents, it not only comprehends all ancestors in the direct ascending line from the intestate, but any one of the blood of the intestate whether in the direct or collateral line, from whom the estate came to the intestate. *Brewster* v. *Benedict*, 14 O. Rep. 385; *Prickett's lessee* v. *Parker*, 3 O. S. Rep. 396.

The course of descents marked out by this statute for ancestral estates is the following:

1. To children of the intestate or their legal representatives.

2. To the brothers and sisters of the intestate of the ancestral blood, whether they are of the whole or half blood of the intestate, or their legal representatives.

3. If the estate came by deed of gift from an ancestor still living, to such ancestor.

4. If the ancestor from whom the estate came be dead, to the brothers and sisters of that ancestor or their legal representatives, or if none exist, then to the intestate's brothers and sisters of the half blood, though not of the ancestral blood.

5. To the next of kin of the intestate of the ancestral blood.

No question arises as to children or brothers and sisters, or a living ancestor from whom the estate came. The descent from Maria Jane Barr was either to the brothers and sisters of her grandfather, and their descendants, or to the brothers and sisters of her father and their descendants. No brothers and sisters are mentioned in this clause of the statute, except brothers and sisters of the intestate of the ancestral blood, mentioned in the second section, and brothers and sisters of the ancestor from whom the estate came, mentioned in the first part of the fourth section, and brothers and sisters of the intestate of the half blood, and not of the ancestral blood, mentioned in the second part of the fourth section.

If brothers and sisters of any other ancestor, even of the immediate ancestor, from whom the estate did not come, take at all under this statute, it is under the description of *next of kin* of the intestate, mentioned in the fifth clause.

These classes are arranged in due order of priority, beginning with the first, and passing through the entire series to the last, by regular gradation. The second class only takes if there are none to take under the first class, and the fifth only takes if there are none to take under der the first, second, third, and fourth sections.

The plaintiffs claim under the fifth section, the defendants claim under the first part of the fourth section. They claim under the brothers and sisters of the father of the intestate, an ancestor from whom the estate did not come to the intestate. We claim under the brothers and sisters of the grandfather of the intestate, an ancestor from whom the estate did come to the intestate. There is no dispute about the facts, and there can be no dispute about the language—the words used by the Legislature. It stands plainly enough written that the brothers and sisters of the

intestate of the ancestral blood are preferred to the brothers and sisters of the ancestor from whom the estate came, and that *they* are preferred to the brothers and sisters of the intestate not of the ancestral blood, and that *these last* are preferred to the brothers and sisters of any ancestor from whom the estate did not come. We stand, by two degrees, above the defendants.

Pray what is the ground upon which so plain a priority is to be disturbed? It is simply, that it could not have been *the intention* of the law to provide for so unreasonable a thing, as to prefer the brothers and sisters of the ancestor from whom the estate came, to the children of that ancestor.

But the canons of construction caution us that *the words* of the law are first to be considered. If these are clear, and involve no repugnancy, or absurdity, the construction must be according to the words. In truth, all other rules of construction remain in abeyance if the words are clear and convey without doubt *the intention* of the law-maker. The question is not whether we who argue this case, or the Court which is to decide it, would have preferred the fourth class to the fifth class, or whether in our estimation of what is right, just, or expedient, the brothers and sisters of William Barr should have been preferred to his own children. Any one who will take the trouble to look through the legislation of Ohio on the subject of descents will see how arbitrary and changeable are the canons of descent as declared in our statutes. Only one of all these canons has remained unchanged, and that is the one which provides for children and lineal descendants. Beyond that, every canon of descent to collaterals, and to lineal ancestors, has been again and again modified; sometimes one class is preferred, sometimes another, and often, a stranger in blood, as surviving relict of the intestate, is allowed to

take in the character of an heir after the lineal descendants.

The two sections of the Act of 1815, which provide for descent of ancestral estates, to the ancestor from whom the estate came, if living, and next to his brothers and sisters if he be dead, were first introduced into our code of descents by the Act of 1814. 2 *Chase*, 854. They were re-enacted, in the same words, by the Act of 1815. 2 *Chase*, 906; the Act of 1824, 2 *Chase*, 1313; and the Act of 1831, 3 *Chase*, 1789; and continued to be in force under the provisions of these acts until 1835, a period of about twenty-one years.

The Act of 1835 (1 *Curwen*, 199), introduces a new canon of descent, and carries the estate to the children of the ancestor from whom the estate came, and next after them to his brothers and sisters. So that if this case were to be governed by the Act of 1835 it would be just as clearly with the plaintiffs as under the three prior acts it was against them. For some reason, perhaps a very sufficient one, the Legislature of 1835 preferred the children to the brothers and sisters. It was deemed a matter of so much importance that the Act of 1835 was passed for *the sole* purpose of making the change, for it does not change any other part of the prior statute. According to the plaintiff's counsel the true construction of the prior law devolved the descent upon the children. According to their argument there was no necessity for further legislation on that point, and the Legislature of 1835 did a work of supererogation. But it seems the Legislature of 1835 were of a different opinion. If that Legislature had concurred in the plaintiff's construction, they would have left the prior statute to stand, or would have passed a declaratory law, instead of which *they repealed* the prior law. See, now, how easy it was to make the matter clear,

when such was the intention of the Legislature. This is the simple and direct language in which it was done. "If the ancestor from whom the estate came, be deceased, *the estate shall pass to the children of such ancestor or their legal representatives;* if there be no such children or their legal representatives, the estate shall pass to the brothers and sisters of such ancestor or their legal representatives."

The words in italics are those introduced by the Act of 1835. They are very plain, but not any plainer than the words of the former law. There is no room nor necessity for rules of construction as to either of these sections. One in clear language prefers the brothers and sisters of the ancestor, the other in language equally clear, prefers the children. They are *repugnant* to each other only in this particular, and for that reason the last act *repeals* the prior act.

It appears, from an opinion of N. Wright, Esq., which will be before the Court, that some one had suggested the idea that the fourth clause of the Act of 1815, which gave the estate to the brothers and sisters of the ancestor, might be limited to estates which came *by gift*, and not to those which came by *devise* or *descent*. Mr. Wright answers this notion conclusively. It is not necessary to refer to it again, especially as it is not adopted by the counsel for the plaintiffs, who state distinctly that gifts, devises, and descents "are in the same category, and expressly included in, and provided for by the same terms of the statute." (*Printed argument for plaintiffs, page* 7).

I have carefully examined all the decisions of the Supreme Court of Ohio upon our statutes of descent, and do not find a word in any one of them which gives the slightest countenance to the claim set up by the plaintiffs. On the contrary, whenever anything is said touching the sec-

tion now in controversy, it makes for the defendants. There has been no decision upon the express question made in this case, but all incidental references and dicta, are in our favor. Take, for example, what is said by Judge Lane, in giving the opinion in *Armstrong* v. *Miller*, 6 Ohio Rep. 123.

Referring to the statute he says: "It provides that if the title to an estate shall have come to the intestate, by descent, devise, or deed of gift, from an ancestor, it shall descend,

"1st. To his children.

"2nd. To the brothers and sisters of the intestate, who may be of the blood of the ancestors from whom the estate came.

"3rd. To the ancestors, if living.

"4th. To the brothers and sisters of that ancestor."

This is a condensed statement of the statute, given in clear terms, without any doubt or qualification.

I do not deem it necessary to carry this argument further. The case seems to me, on both points, to be clearly with the defendants. This farm was purchased nearly thirty years ago, upon the faith of the law of descents as that law then stood, and as it was construed by eminent lawyers of the time.

Since that early day it has appreciated immensely in value—has for the most part passed out of the hands of the original purchasers, and has been greatly improved by the labor and capital of the present owners. Whatever might have been the imputed injustice of the law which fixed the descent of this property, it is now quite too late, if we had the power, to set that matter right, without doing a greater wrong, by disturbing those who acquired the title whilst that law was in force.

I understand it is claimed by the counsel for the plain-

tiffs that if they succeed in ousting us from our possessions, we will not be entitled to compensation for our improvements. *That* is a question it is not now necessary to discuss, and one, I trust, which will not arise in the case.

HENRY STANBERY,

For Defendants.

June, 1865.

IN THE CIRCUIT COURT OF THE U. S.

FOR THE SOUTHERN DISTRICT OF OHIO,

At the April Term, 1865.

PATRICK CONSIDINE, EPHRAIM MORGAN, JOHN YOUNG, AND CAROLINE YOUNG, HIS WIFE, E. HENRY CARTER, JOSEPH B. HUBBARD AND REBECCA A. HUBBARD, HIS WIFE, IMPLEADED WITH JOHN B. PURCELL AND STEPHEN S. BOYLE,

ads.

JOHN DOE, EX DEM. JOHN A. POOR AND MARGARET R. POOR, HIS WIFE.

ARGUMENT FOR THE DEFENDANTS.

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ARGUMENT FOR THE DEFENDANTS.

William Barr, senior, died May 15th, 1816, seised of one hundred and sixty-one acres and four-tenths of an acre, being the north-east quarter of section thirty-six, fourth township, first fractional range of the Miami purchase, in Storrs township, Hamilton County, Ohio.

He had executed a will, in due form, on the 24th of February, 1816, by which he thus disposed of the property in question:

> "I give and devise unto my sons-in-law, William Barr, James Keys, and John B. Enness, of Cincinnati aforesaid, and to their heirs, all and singular that certain farm, tract, or parcel of land situate, lying, and being in the county of Hamilton, and State of Ohio, which I purchased of John Cross, containing one hundred and sixty acres, to hold the same premises to them and their heirs in trust (first) for the use of my son, John M. Barr, during his natural life;

but, nevertheless, to permit and suffer my son, John M. Barr, to hold, use, occupy, possess, and enjoy the said farm, and to receive and take the rents and profits thereof, during his natural life. And in case my said son, John M. Barr, should die leaving a legitimate child or children, then, also, in trust for Maria Barr, wife of the said John M. Barr, in case she survive him, during her natural life, for the purpose of maintaining herself and the said child, or children, and educating the said children; but, nevertheless, to permit and suffer the said Maria Barr, wife of the said John M. Barr, to hold, use, occupy, possess, and enjoy the said farm, and to receive and take the rents and profits thereof, during her natural life. And upon the decease of the said Maria Barr, wife of the said John M. Barr, in case she survive him; if not, then upon the decease of the said John M. Barr, I do further give and devise the remainder of my estate in said farm unto the legitimate child or children of the said John M. Barr, and their heirs forever. *If my said son leave but one child, as aforesaid, then I give and devise the said farm to him or her, or his or her heirs forever.* But, if he leave two or more children, then I give and devise the said farm unto such children, and their heirs, to be equally divided between them. But should my said son, John M. Barr, die without leaving any issue of his body, then, and in that case, I do give and devise the remainder of my estate in the said farm unto my said sons-in-law, William Barr, James Keys, and John B. Enness, and their heirs forever.

"And if the present wife of my son, John M. Barr, should survive him, he, the said John M. Barr, dying without leaving any legitimate issue, then I direct my said sons-in-law, their executors and administrators, to pay or cause to be paid unto her yearly, and every year, during her widowhood, the sum of two hundred dollars. And if, during her widowhood, she should again be lawfully married, then I further direct my said sons-in-law, their heirs, executors, or administrators, to pay or cause to be paid unto her the sum of one thousand dollars unless the personal estate of my said son, John M. Barr, at his death, should exceed the sum of four hundred dollars: then, whatever the personal

estate shall exceed the last mentioned sum, shall be taken and deducted from the said sum of one thousand dollars; the said annuity and gift at marriage, or either, to be paid out of my personal estate."

The Will then directs the executors to make certain improvements on the land, and to pay the expenses thereof out of the *personal* effects.

John M. Barr died on the 10th of August, 1820, leaving issue one child, MARY JANE BARR, by his said wife (Maria) begotten.

That child was living on the 21th of February, 1816, when William Barr, senior, executed his will, but died in the sixth year of her age, November 27th, 1821.

Maria Barr, the widow, lived until August 3d, 1860, having been married to a second husband, John Bigelow, whom she survived.

The plaintiff's lessors claim in the right of the heirs at law of John M. Barr's sisters.

The defendants claim in the right of the heirs at law of the child, MARY JANE BARR, according to the statute of descents in Ohio, passed December 30th, 1815.

THE WILL.

In the clause quoted above—the only clause applicable to this property—the devisor contemplates the alternative of his son (John M. Barr) dying with or without issue The clause may be divided, accordingly, by that alternative.

John M. Barr took as devisee under the will, and not as heir: he took the property—to specify no other particular—in exclusion of his sisters, or their children. He had issue, and that issue, a daughter, survived him.

Clearly, then, it is unnecessary to argue what, *in case he had survived his daughter*, the title would be.

These facts render it plain that ALL the clauses of the devise contemplating the possibility of John M. Barr's death without issue, are out of the question. The case of Bigelow *v.* Barr, 4 Ohio Rep. 358, is decisive in that regard. For, had those clauses taken effect by the subsequent death of the daughter, the widow's life estate would have *then* determined. But the Supreme Court of Ohio declared that the widow (Maria) was entitled to an estate, for her life, in the property devised.

The sons-in-law of William Barr, senior, have no estate, UNDER HIS WILL, in any other event than that of John M. Barr's dying without issue. If they take the property, at all, they must take it by inheritance to some one, and not as devisees.

Our consideration may be limited, therefore, to those clauses of the Will which contemplate the death of John M. Barr leaving issue.

The property is devised to the sons-in-law, and their heirs, in trust:

1. To permit John M. Barr the usufruct and *legal* estate for his life.

2. In case he should die leaving issue, to permit his widow (Maria) the usufruct and *legal* estate for her life.

3. To preserve the estate in remainder, THE FEE SIMPLE, until John M. Barr should die.

4. At the decease of the husband, John M. Barr, if any child of his, lawfully begotten from his wife, Maria, should then be living, to devolve the *legal* estate, as well as the usufruct, upon that child, AS DEVISEE, in fee simple.

These are my opinions; and now to the argument.

There is a difference between the estate of John M. Barr and that of his wife, MARIA, although they have points of resemblance. The latter—Mrs. Barr's estate—is clearly an estate for life. It is not followed by any estate of inheritance to her children, *merely as such*, and is given for a specific purpose—"for the purpose of maintaining herself and the said child or children, and educating the said children."

The estate of John M. Barr is given to him (it would seem) out of merely *personal* regard. It is followed by a devise of the remainder to his child or children: or, in other words, the devise is to *him* for life, and, subject to the possibility of an estate to his widow (Maria) for her life, to whatever child *he* should leave.

I once thought the rule in Shelley's case, 1 Reports, 104, aided by the doctrine of Wild's case, 6 Reports, 17, would convert the estate of John M. Barr into an estate in fee tail; but that was, *first*, before I had been informed of the fact that Mary Jane Barr was living at the time of her grandfather's will, February 24th, 1816; and, *second*, before I had sufficiently considered the judgment of Lord Chief Justice Willes in Ginger *v.* White, Willes, 348. Ib. 352, 353, 354, 355.

But, supposing that John M. Barr would have taken an estate in fee tail, at common law, we instantly encounter an act of the Legislature of Ohio, entitled an act to restrict the entailment of real estate, passed on the 17th of December, 1811:

> "That, from and after the taking effect of this act, no estate in fee simple, fee tail, or any lesser estate in lands or tenements lying within this State shall be given or granted, by deed or will, to any person or persons but such as are in being, or to the immediate issue or descendants of such as are in being, at the time of making such deed or will.

And that all estates given in tail shall be and remain AN ABSOLUTE FEE SIMPLE *to the issue of the first donee in tail.*

"This act to take effect, and be in force, from and after the first day of June next." [Swan & Critchfield, vol. 1st, page 550.]

In any event, therefore, the devise to John M. Barr would have been for *life* only, with remainder, *in fee simple*, to his child (MARY JANE BARR) as the issue of the first donee in tail.

It is evident, on this statement, that my conclusions, as reported by our distinguished opponent, HON. THOMAS EWING, are correct:

"I construe the will as giving a present *legal* estate to John M. Barr for his life, with remainder in fee simple to three trustees (Barr, Keys, and Enness) for the purpose of supporting and feeding the two contingent estates limited in favor of Maria Barr and the children.

"On the death of John M. Barr, leaving issue, the estate of Maria Barr became vested, as a *legal* estate, for her life, and the remainder (theretofore contingent) to Mary Jane Barr, *in fee simple*, became also vested.

"The office of the trustees expired at *that* time, and their estate was wholly determined."

I have only, at present, to demonstrate the soundness of *this* proposition; and, for the sake of brevity as well as authority, I use the words of Mr. Jarman in his excellent treatise on the doctrine of Wills, volume 1st, page 726:

"The Law is said to favor the VESTING of estates; the effect of which principle seems to be that property which is the subject of any disposition, *whether testamentary or otherwise*, will belong to the OBJECT OF GIFT immediately on the instrument taking effect, or as soon afterward as such object comes into existence, or the terms thereof will permit."

And I cite, in support of the doctrine, these decisions:

Carver *v.* Jackson, 4 Peters, 1. Ib. 91, 92.
Richardson *v.* Wheatland, 7 Metcalf, 169. Ib. 175.
Right *v.* Creber, 5 Barn. & Cresswell, 866.
Wrightson *v.* Macaulay, 14 M. & Welsby, 214. Ib. 231, 232
Boraston's case, 3 Reports, 16. Ib. 21.
Doe *v.* Moore, 14 East, 601.
Doe *v.* Prigg, 8 Barn. and Cresswell, 231.
Doe *v.* Ewart, 7 Ad. & Ellis, 636.
Jackson *v.* Luquere, 5 Cowen, 221. Ib. 229, 230.
Moore *v.* Lyons, 25 Wendell, 119.
Hutchinson *v.* Stephens, 1 Keen, 240.
Lawrence *v.* McArter, 10 Ohio Rep. 37.
Foster *v.* Wick, 17 Ohio Rep. 250.
Johnson *v.* Valentine, 4 Sandford, 36, 37.
Minnig *v.* Batdorff, 4 Penn. State R. 503.
Jeffers *v.* Lampson, 10 Ohio State Rep. 101. Ib. 104, 105.

Must I demonstrate, also, that John M. Barr and his widow, Maria, took *legal* estates as well as the usufruct? If so, I will again refer to Mr. Jarman's treatise:

> "When real estate is devised to one person upon trust to permit and suffer another to receive the rents, the beneficial devisee takes the *legal* estate, and not the trustee." 2 Jarman, 202.

William Barr's will seems to have been written with an eye to this very sentence.

There is, however, an objection to be stated:

> "In the proposition that a devise to a person, *upon trust to permit another to receive the rents*, vests the LEGAL estate in the latter, it is assumed that no duty is imposed on the trustee, either expressly or by implication, requiring that he should have the estate. For, in such case, it is clear the trustee will take the legal estate." 2 Jarman, 202, 203.

These trustees (the sons-in-law) are directed to do but

one thing, in regard to the land, during John M. Barr's life—"to finish, or cause to be finished, in a plain manner, the house and kitchen at present erected on the farm aforesaid, for the use and occupation of the said John M. Barr, as soon after my decease as is practicable."

"*The said expense*," the Will continues, "*to be defrayed out of such parts of my* PERSONAL *estate as are not especially bequeathed.*"

This duty does not require them to have the *legal* estate. It is a mere direction to apply funds in their hands, as executors and trustees, to a specific improvement—of the same character, exactly, as a direction to pay off any lien to which the "farm" might then have been subject.

The doctrine of carrying the legal estate from the trustee to uses over to the beneficial devisee does *not* depend—as our opponents imagine—upon the application of the Statute of Uses to wills. 2 Jarman, 196, 197, 198.

Nor does the employment of the words "*in trust for*" rather than the words "*to the use of*" change the rule. 2 Jarman, 198, 199.

It is almost an act of supererogation, after these authorities, to cite the case of King *v.* Beck, 15 Ohio Reports, 559.

Conceding that John M. Barr took an estate tail (which is impossible) the statute of December 17th, 1811, so operated on the devise as to limit him to an estate for life, and devolve the remainder, *in fee simple*, on MARY JANE BARR as the specified issue of his body.

From John M. Barr, consequently, *except on the doctrine of a lapsed devise*, no inheritable estate can possibly be derived.

The question is, therefore, at last as at first: *When did the estate of* MARY JANE BARR *become a vested remainder?*

My learned opponents contend that its *vesting* was postponed until Mrs. Barr's death. I do not so understand the law.

To detail this question fully:

I. The property was given to the sons-in-law, and their heirs, in trust.

Here is a fee simple estate, *conditional*, in them; but subject, of course, to the trusts expressed.

II. The use or trust for John M. Barr became executed, and thus he took a LEGAL estate for his life; the trustees holding the remainder, in fee simple, during his lifetime, and to await the alternative of his dying with or without issue.

Now, as I have said, John M. Barr had a child (MARY JANE BARR) living at the time of the execution of his father's will, at the time of his father's death, and at the time when the will was proven and recorded. Nothing was doubtful, therefore, except the alternative contemplated and described in the will: *Would this child survive her father?* If not, the estate would go to the trustees, *themselves*, for their own use; and Maria Barr would have an annuity, or, in case of her second marriage, a gift.

On the other hand, if MARY JANE BARR should survive her father (*as she did*) that fact would resolve the ONLY doubt. And this in three aspects:

1. It would forever destroy the claim of the sons-in-law as devisees.

2. It would give Maria Barr an estate for her life.

3. It would *immediately* vest in MARY JANE BARR the whole remainder of the estate, legal and equitable, in fee simple.

There could be no lapsed devise: there is no point, or contingency, at or in which that could possibly happen.

Is it pretended that the estate of MARY JANE BARR was only an *equitable* one? Or that the sons-in-law, as trustees, had any title after her estate had become vested? Assuredly, after so many decisions in America as well as in England, upon that subject, it would be worse than idle to argue such a question. The words of the will are that "*the remainder of my estate in said farm*" shall pass to John M. Barr's child or children. That includes every title which the devisor had, legal or equitable, and, at once, discharged the trustees.

And here, exactly, we can ascertain the office, *and the* WHOLE *office*, with which the trustees were invested. They were to hold the estate in remainder (fee simple) to the day of John M. Barr's death: first, to support and feed the contingent remainder limited in favor of Maria Barr in case her husband should die leaving issue; second, to devolve the other contingent remainder, in fee simple, on whatsoever child of John M. Barr might be *then* alive. That done, all was done; and their trust, estate, title, and interest, of every description, immediately vanished. Maria Barr had a vested *legal* estate for her life; and, subject to that, *and that only*, the child, MARY JANE BARR, was seised of the remainder, legally and equitably, in fee simple.

The only use in having trustees, under such a will, is to preserve the remainder, in abeyance, until it can vest in the person or persons ultimately entitled to the estate; for, as we have seen, the trustees had no duty to perform except that of employing money, otherwise provided, to complete a farm-house.

Hardly an instance of a will, or a marriage settlement, can be found in the books on conveyancing, and especially

the English books, in which trusteeships of this description are not interposed; and, always, from mere abundance of caution. David Wade, in whose handwriting the will is, and who attested its execution, was an old-fashioned lawyer—one who attached the utmost importance to every word, superfluous or otherwise, to be found in the English forms of conveyance.

It remains, simply, to decide *when* the estate of MARY JANE BARR was to become vested. I have copied the words of Mr. Jarman, and added to them a long list of adjudicated cases. But Mr. Jarman did not stop with the words I quoted. On the contrary, he proceeded thus:

> "It may be stated, as a general rule, that where a testator creates a particular estate, and then goes on to dispose of the ulterior interest, expressly, in an event which will determine the prior estate, the words descriptive of such event, occurring in the latter devise, will be construed as referring merely to the period of the termination of the possession or enjoyment under the prior gift, and not as designed to postpone the vesting. Thus, when a testator devises lands to A. for life, and, after his decease, to B. in fee, the respective estates of A. and B. (between whom the entire fee simple is parceled out) are BOTH vested at the instant of the death of the testator; *the only difference between the devisees being that the estate of the one is in possession, and that of the other in remainder.*" 1 Jarman, 726 727. See, also, 1 Jarman on Wills, 728–744.

How absurd to say, in view of this doctrine, that the vesting of Mary Jane Barr's estate, was *postponed* until the death of her mother! Mr. Jarman puts our very case, and, aided by a multiplicity of authorities, has decided it.

WHO ARE THE CHILD'S HEIRS?

It will be observed that I make the child (MARY JANE) a *devisee* of William Barr, senior, throughout this argument. I admit, frankly, that unless she took as devisee, under the will, the course of transmission would be widely different from what I shall indicate. If she had taken by inheritance from her father (John M. Barr) the property would pass to John M. Barr's sisters and their heirs. But I can arrive at no other conclusion than that MARY JANE took as devisee of William Barr, senior, and not in the character of an heiress. She died without issue, and intestate. We must look, therefore, to the act of December 30th, 1815, for the purpose of ascertaining who are her heirs. That act (2 Chase's Stat. 906) specifies two courses of transmission—one where real property came to the intestate by descent, devise, or deed of gift from an ancestor; and, another, where such property did not so come to the intestate. Our case belongs to the *first* class; for the lands came to the intestate (MARY JANE BARR) by devise from her ancestor, William Barr, as above indicated. In the case of Curren *v.* Taylor, 19 Ohio Rep. 36, the estate came to the intestate by descent from its father, and not by deed of gift from its grandfather. Herein is a wide and plain distinction.

The first section of the act of December 30th, 1815, regulates the transmission of property which came to an intestate by descent, devise, or deed of gift, from an ancestor. It may be found on pages six and seven of our printed pamphlet.

The course of transmission there specified is full of contingencies; but they are accurately detailed. The *first* clause would give the property to the children of the intestate, or their heirs; but this intestate, MARY JANE

BARR, never had any issue. The *second* clause would give the property to the intestate's brothers and sisters; it matters not whether they be of the whole or the half blood, so that they be of the blood of the ancestor from whom the estate came. This intestate had no brother nor sister. The *third* clause can have no application to the present case; inasmuch as it relates, exclusively, to deeds of gift. The *fourth* clause, so far as I need to quote it, is in these words:

> "If there be neither brother nor sister of the intestate, of the blood of the ancestor from whom the estate came, or their legal representatives, and if the ancestor from whom the estate came be deceased, the estate shall pass to the brothers and sisters of the ancestor from whom the estate came, or their legal representatives."

The ancestor from whom the estate came, in this instance, was William Barr, senior, whose will I have just examined. Our case, therefore, is within the operation of that clause. The brothers and sisters of William Barr, senior, or their heirs, are, by the statute, made heirs at law of Mary Jane Barr—the heirs to whom the will has given the property in question.

It may appear strange, at first, that grand-uncles and grand-aunts should thus be preferred to uncles and aunts; but, when we consider all the circumstances, our surprise will somewhat abate. William Barr had sufficient reason, doubtless, for *excluding* his daughters from the ownership of this land: he indicated, in express words, the ONLY event in which he intended his sons-in-law to have it.

The statute has literally executed his will—has set aside his daughters, and has avoided giving the sons-in-law a more favorable opportunity than the devisor proposed.

INTENTION OF THE WILL.

I repeat my words: *The act of December 30th, 1815, has carried into effect what William Barr, senior, intended.* When I say this, however, I do not mean to say what he supposed, or expected, or, in other circumstances, might have ordered. As Mr. Baron Parke, now Lord Wensleydale, observed in the case of Doe *v.* Garlick, 14 M. & Welsby, 701: "INTENTION may mean what the testator *intended* to have done; whereas the ONLY question, *in the construction of wills*, is ON THE MEANING OF THE WORDS."

And I must be permitted to adopt, in this connection, some words of my friend, JUDGE MATTHEWS, inasmuch as I can not improve them:

> "It ought to be a sufficient answer to say that we have no concern with what might have been the testator's intention in reference to events he neither foresaw nor expected. Our sole business is to ascertain what intention he has, in fact, declared in the circumstances in which he was placed.
>
> "It is unsafe and inadmissible to resort to the light of *subsequent* events to explain the meaning of a will. We are all very wise after the fact, but should endeavor not to be wise above what is written. The temptation to gratify our own will, by proving it to be that of the testator, is dangerous and great. The soundest judicial authorities unite in condemnation of the resort to which an appeal is here made. We must put ourselves in the situation of the testator—see, ONLY, with *his* eyes, think with *his* understanding, *and dispose as he has declared.*"

William Barr, senior, intended that the child or children of his son, John M. Barr, should be the SOURCE of inheritance, or derivation, for all this estate; such child, or children, being the *object* of his bounty, and the person or persons in whom he felt the greatest concern. That is the chief design—the central idea—of his will.

Whether he did, or did not, contemplate the possibility of those events which transpired after his death—the possibility, for example, that MARY JANE BARR would survive her father, and die without issue, intestate, and, thereupon, his brothers and sisters would inherit from her, as heirs and heiresses at law, to the exclusion of his own daughters—is a question wholly unfit to be argued. Otherwise, a devisor could specify a million contingencies, and govern his estate for a thousand years.

The LAW is not so; nor will any civilized community ever tolerate such an idea.

And, certainly, the field of a discussion like that is not only limitless, but without any sufficient guide.

Whatever he contemplated, or expected, or even desired, William Barr, senior, in dictating the terms of his will, left the future of John M. Barr's child or children to its own chapter of events and consequences. He employed no language to indicate his purpose (if such purpose he had) of *preventing* that disposition of the estate which occurred. He might have done so; but he did not. To infer what he failed to express, or even indicate, and that in derogation of his general scheme, his manifest and governing conception, is a liberty which Courts can not indulge. It would be, as LORD KENYON said, to "proceed on *conjecture* only, and against the express words of the will." Doe *v.* Perryn, 3 Term Reports, 492.

In Crane *v.* Doty, 1 Ohio State Rep. 279, where the testator declared that one of his children (Serepta) should have a certain portion of his estate, "*and no more*," but omitted to dispose of the general residue, it was decided that Serepta should have her share, *as in case of intestacy*, in such residue.

William Barr, senior, as I said, inasmuch as his granddaughter (MARY JANE BARR) was living at the date of his